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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

January Term, 1959

No. 872

NORTH CENTRAL AIRLINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
LAKE CENTRAL AIRLINES, INC., *Intervenor*
LAKE CENTRAL EMPLOYEE STOCKHOLDER GROUP, *Intervenor*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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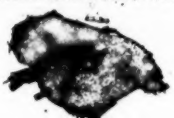

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Petitioner, the appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on January 29, 1959.

OPINIONS BELOW

The Civil Aeronautics Board entered an opinion in the case of *North Central Airlines' Acquisition of Lake Central Airlines*, Docket No. 5770, Order No. E-11548, on July 9, 1957 (J.A. 480) and denied North Central's petition for reconsideration in Docket No. 5770 by Order No. E-11932, entered November 1, 1957 (J.A. 558). The opin-

ion of the United States Court of Appeals for the District of Columbia Circuit is set forth in Appendix B to this Brief.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Did the Civil Aeronautics Board have the power to convert an acquisition proceeding under Section 408 of the Civil Aeronautics Act of 1938 into a competitive hearing by inviting and permitting the intervention of prospective buyers of the Lake Central stock other than North Central, and by permitting the intervention of the Lake Central Employee Stockholder Group, thereby distorting and changing the statutory test of *whether the acquisition was not consistent with the public interest* to *which of several alternatives for the operation of Lake Central was, in the discretion of the Civil Aeronautics Board, preferable?*

2. Did the Civil Aeronautics Board improperly deprive North Central of its right to a full and fair hearing under the Fifth Amendment of the Constitution, the Administrative Procedure Act, the Civil Aeronautics Act of 1938, and the Rules and Regulations of the Board by holding individual *ex parte* conferences with representaatives of the Lake Central Employee Stockholder Group concerning matters pertinent to the acquisition of the Lake Central stock by North Central?

3. Did the Court below improperly sanction a departure from the doctrine announced by this Court in *Ashbacker Radio Corporation* v. *FCC*, 326 U.S. 327, 66 S.Ct.

148 (1945) and deprive North Central of a full and fair hearing when it failed to hold that the Civil Aeronautics Board had erred in permitting without notice to North Central the amendment of the Lake Central Voting Trust Agreement so as to allow the transfer of the voting trust certificates to the Lake Central Employee Stockholder Group, thereby placing North Central in the position of having to displace an established licensee instead of merely having to take over the operation of the airline from an unfit management?

4. Did the Court below improperly sanction an unexplained departure by the Civil Aeronautics Board from its established precedents concerning acquisition and merger cases?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS OF THE CIVIL AERONAUTICS BOARD INVOLVED

The consideration of this case involves Amendment Number V to the Constitution of the United States, portions of the Administrative Procedure Act [5 U.S.C. 1001 et seq.], the Civil Aeronautics Act of 1938 [49 U.S.C. 401 et seq.], and portions of the Economic Regulations of the Civil Aeronautics Board. The pertinent sections of these documents are set forth fully in Appendix A to this petition.

STATEMENT OF THE CASE

Petitioner, North Central Airlines, Inc., is a Wisconsin corporation engaged in the business of scheduled interstate air transportation of persons, property and mail pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board. Lake Central Airlines, Inc. is a Delaware corporation also engaged in the scheduled interstate air transportation of persons, property and mail under a certificate of pub-

lic convenience and necessity. Petitioner is one of the largest, lowest cost and least subsidized local service operators. On the other hand, Lake Central Airlines is one of the smallest, highest cost and most subsidized local service operators.

Petitioner initiated the proceedings below when it sought the approval of the Civil Aeronautics Board under Section 408 of the Civil Aeronautics Act of 1938 of a contract to purchase approximately 96 percent of the Lake Central stock from John V. Weesner, Roscoe Weesner, William W. Weesner and various corporations controlled by them (Rec. 43, 54, 60). The acquisition contract of which North Central sought approval grew out of the *Reopened Indiana-Ohio Local Service Case*, 16 CAB 880 (1953) which the Board reopened in order to investigate alleged improper, illegal and dishonest practices in the field of air commerce by the Weesners and their associates and their effect upon the fitness, willingness and ability of Lake Central Airlines to engage in scheduled air transportation. The hearing examiner in that case found that there had been serious violations of the Civil Aeronautics Act by John Weesner, Lloyd Hartman, the present executive vice president of Lake Central, and several other Weesner associates (Exam. I.D., CAB Docket No. 4034, pp. 20 and 43).[1] He recommended that Weesner divest himself of the management and control of Lake Central. Before the Board had acted on the

[1] Similarly, the examiner in North Central's acquisition case found more recent dishonest and illegal practices by the Lake Central management which involved this same Lloyd Hartman (Rec. 450 and 451). He was amazed at their alacrity in: (1) raising the salaries of the employees to allow them to pay for their stock; (2) binding the airline to pay for the Weesners' legal fees; (3) indemnifying Dr. Robert Stewart, a member of the Lake Central board of directors, for loss arising out of a suit against him by North Central for breach of fiduciary relationship; (4) defraying their expenses incurred in opposing the acquisition with company funds; and (5) managing Lake Central for their personal ends rather than for the public interest.

examiner's recommendations. Weesner attempted to sell his interest in Lake Central in order to salvage his investment. See *Hartman* v. *North Central Airlines, Inc.*, 241 F.2d 859 (7th Cir. 1957). On September 15, 1952, North Central offered to purchase the stock from the Weesners and a written contract was entered into on September 17, 1952 (Rec. 46).[2] Subsequently, on October 17, 1952, the Civil Aeronautics Board upheld their trial examiner in the *Reopened Indiana-Ohio Local Service Case, supra*, at 944, and found that the Weesners were unfit to engage in air transportation and that they must divest themselves of control of Lake Central. Solely on the basis of North Central's contract and the financial fitness which North Central gave to Lake Central, the Board granted Lake Central a 30 day extension. During this period, the Weesners were to promulgate and present to the Board a plan for divestment of their stock. For this purpose, the Weesners proposed and the Civil Aeronautics Board approved a Voting Trust Agreement.[3] Petitioner requested Board approval under Section 408 of the Civil Aeronautics Act of its contract by applications dated September 30 and November 1, 1952 (Docket No. 5770)[4] and for approval of interlocking relationships under Section 409 of the Civil Aeronautics Act on March 18, 1953 (Docket No. 6024).[5] Ozark Airlines and Trans-

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[2] This contract was amended by a subsequent written contract of October 17, 1952 (Rec. 54).

[3] Thereafter, in spite of their contract with North Central, the Weesners attempted to resell their interest in Lake Central, now in the form of voting trust certificates, to Ozark Airlines, Roscoe Turner and others. *Hartman* v. *North Central Airlines, Inc.*, *supra*. In doing so, the Weesners were violating a provision in their contract with North Central by which they agreed to fully cooperate with North Central in the prosecution of an application for approval of the acquisition (Rec. 49).

[4] Rec. 43-46, 54.

[5] Rec. 6-11.

port Air Group requested consolidation into Docket No. 5770 of their applications to be considered as potential transferees of Lake Central. At the prehearing conference in Docket No. 5770, North Central objected to the consolidation of applications of other potential purchasers and requested that the issues in this case be restricted to the consideration of its acquisition agreement (Orig. Tr. 230). North Central's objections were formalized in its answers to the motions of Ozark and Transport Air Group for consolidation (Orig. Tr. 259). The Board, however, converted North Central's acquisition proceeding into a competitive proceeding when it instituted an investigation ". . . to determine whether and upon what terms the acquisition of the majority stockholding interest in Lake Central by North Central, Ozark and/or Air Group, and whether and upon what terms the acquisition of Lake Central's Route No. 88, in whole or in part, by North Central, Ozark and/or Air Group is consistent with the public interest . . ." and consolidated this investigation with Docket No. 5770 (Orig. Tr. 301).[6]

Finally, on June 25, 1954, the Weesners succeeded in contracting to resell the same stock, now in the form of voting trust certificates, that they had previously contracted to sell North Central. They entered an option contract to sell their voting trust certificates to Lloyd Hartman and Robert Clifford.[7] Hartman and Clifford

[6] The Board further manifested its desire that the acquisition proceeding be a competitive one when it permitted the intervention in 1954 of the Lake Central Employee Stockholder Group (Orig. Tr. 484) over North Central's bitter protest.

[7] Lloyd Hartman was one of the associates of the Weesners who had been censured in the *Reopened Indiana-Ohio Local Service Case, supra*. So far as Hartman and Clifford were concerned, it was a windfall as they took the Weesners' certificates subject to any North Central rights. If the value of the stock were to depreciate, they would not oppose the acquisition by North Central and permit North Central to bear the loss. If the value appreciated, they would (a) claim that North Central had breached its

later sold a part of the certificates to some of the employees of Lake Central and thereafter labeled their group for conspicuous consumption purposes as the Lake Central Employees Stockholder Group.

During the latter part of May or the first part of June in 1954, Hartman and Clifford and other representatives of the Employee Stockholder Group proceeded with a diabolical scheme to capture Lake Central for themselves and held informal *ex parte* conferences with individual Board members. The matters which were discussed were whether there would be any official objection to their going forward with the stock purchase program and whether Lake Central should be operated as a separate entity or merged or dismembered (Orig. Tr. 1985, 364, Appendix C). The result of these conferences was the consummation of the option voting trust purchase contract between the Weesners and Hartman and Clifford entered into on the 25th of June, 1954 (Rec. 202).

Now that they had both feet in the door, the Employee Stockholders openly and actively opposed the acquisition. They petitioned the Board for leave to intervene in Docket No. 5770 (Orig. Tr. 149). The Board allowed the intervention of the Employee Stockholder Group (Orig. Tr. 430), thereby further manifesting its intention that the North Central acquisition proceeding be a competitive one. This permitted the Weesners' assignees, the Lake Central Employee Stockholder Group, whose assignment was specifically made subject to the rights of North Central, which included the right to have the sellers' cooperation in obtaining approval of the acquisition, to violate the sellers' contractual commitments and vigorously oppose approval.

The Employee Stockholders instigated as amendment to the Voting Trust Agreement to allow them to pur-

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contract and had no rights and (b) oppose the acquisition before the Board and, if successful in either case, "steal" the benefits of North Central's contract.

chase the voting trust certificates without terminating the trust.[8] On January 11, 1955, the Employee Stockholders filed a formal application for approval of this amendment in Docket No. 4034, the *Reopened Indiana-Ohio Local Service Case, supra*. No notice was given to North Central of this application by either the Lake Central Employee Stockholder Group or the Civil Aeronautics Board. By chance North Central received word of this application and objected strenuously to the amendment of the Voting Trust Agreement (Orig. Tr. 443, 453, 463). The Board granted the Lake Central Employee Stockholder's request over the objections of North Central in Docket No. 4034, Order No. E-8931, thereby making it possible for the Employees to exercise their option and purchase the voting trust certificates.[9]

In 1955, the Board severed from Dockets 5570 and 6024 upon request of both North Central and Lake Central all applications of prospective purchasers other than the Lake Central Employee Stockholders, and the case proceeded to hearing in November 1955. After hearing, the examiner found that the acquisition would not be inconsistent with the public interest, and recommended its approval (Rec. 441-467). The Board reversed its examiner, however, and refused to approve North Central's acquisition contract on the principal grounds that the North Central and Lake Central trade areas are not "complementary" and that the combined systems would

[8] The original Voting Trust Agreement provided that a transfer of more than 75 percent of the voting trust certificates would terminate it. The Employee Stockholders sought amendment of the agreement so as to eliminate this provision.

[9] Hartman and Clifford did not confine their efforts to pre-empt the North Central contract to proceedings before the Board. They filed a suit in the U. S. District Court for the Southern District of Indiana to have the contract declared breached by North Central all pursuant to the above-stated scheme. This attempt failed when the U. S. Court of Appeals for the Seventh Circuit found that the contract had not been breached (*Hartman* v. *North Central Airlines, Inc., supra*).

create a local service carrier of "unprecedented size." The Board's action in considering each of these findings as ground for denial of approval constituted clear departures from the Board's own prior decisions. In the *Arizona-Monarch Merger Case*, 11 CAB 246 (1950), the Board specifically held that ". . . it is not essential that the routes of the two companies be complementary . . ." in an acquisition or merger proceeding; and in the *West Coast-Empire Case*, 15 CAB 971 (1952), it was necessary for the Board to certificate a new segment to close a hiatus between the route systems of the merging carriers. Furthermore, the Board departed from its findings in other acquisition and merger cases that size of the combined carriers is not *per se* a consideration in the determination of inconsistency with the public interest. North Central petitioned for reconsideration of the Board's order (Rec. 519). After denial of reconsideration, North Central petitioned for judicial review in the U. S. Court of Appeals for the District Circuit.

Briefs were submitted to the Court of Appeals and oral argument held. Subsequently, the Court requested supplemental briefs by the parties on four questions involving procedural improprieties on the Board's part, which would vitiate the administrative proceedings in this case (Rec. 568). On January 29, 1959, the Court of Appeals issued its decision and opinion in this case affirming the decision of the Civil Aeronautics Board (Rec. 561-566). In its opinion, the Court dismissed the questions requested on supplemental briefs by merely saying (Rec. 565):

> "With the assistance of supplemental memoranda from counsel for the parties, the Court has explored several questions relating to the procedure before the Board, but we find no reversible error in these respects."

The Court also condoned the Board's unexplained departures from its precedents and attempted to explain

them by attributing them to a valid exercise of administrative discretion (Rec. 516). Its reasoning with respect to this point was vague, inconsistent and indecisive. Petitioners respectfully request that a writ of certiorari issue to review the erroneous decision of the Court below.

REASONS FOR GRANTING THE WRIT

A. The Board Did Not Have the Power to Invite and Permit the Intervention of Other Prospective Purchasers for the Lake Central Stock and to Thus Convert the Acquisition Proceeding into a Competitive Hearing.

The very nature of a merger or acquisition proceeding under Section 408(b) of the Civil Aeronautics Act is non-competitive.[10] Such a proceeding differs from a Section 401 route certification case in that it can only arise out of an agreement between separate entities, whereas route cases are born of disagreement as to which or how many carriers should operate a given route. There is no express statutory authority whatever for converting a 408 hearing into a competitive proceeding. To the contrary, Section 408(b) refers repeatedly to "the" acquisition of control and "such" acquisition of control, ob-

[10] Section 408(b) of the Civil Aeronautics Act of 1938 defines the power of the Board in acquisition cases as follows:

"(b) Any persons seeking approval of . . . acquisition of control specified in subsection (a) of this section shall present an application to the Authority [Board] and thereupon the Authority [Board] shall notify the persons involved in the . . . acquisition of control and other persons known to have a substantial interest in the proceeding of the time and place of a public hearing. Unless after such hearing the Authority [Board] finds that . . . acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such . . . acquisition of control upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe."

viously meaning "the" acquisition contract entered into between the acquiring and the acquired airline. The Board's power in acquisition cases under Section 408 is negative. It can act only if one of the carriers applies for approval of an acquisition *agreement*. Certainly the Board cannot institute acquisition proceedings of its own or force unwilling carriers into a merger, and it is obliged to respect contractual agreements unless they are not consistent with the public interest. Such a power would have the effect of forcing either an unwilling buyer or an unwilling seller to consent to the acquisition. Logically, therefore, the Board is limited to the consideration of that agreement of which approval is requested.

One of the things considered to be in public interest under Section 2(b) of the Civil Aeronautics Act is the fostering of sound economic conditions in air transportation. Mergers and acquisitions are methods of effecting this consideration. Undoubtedly, it was the intention of Congress in passing Section 408 to favor strengthening of weak carriers through mergers and acquisitions.[21] For this reason, Congress made an acquisition inferentially in the public interest by requiring that the Board approve the acquisition unless it finds that it will not be consistent with the public interest. If the decisions of the Civil Aeronautics Board and the Court of Appeals are allowed to stand, the Congressional intent will be thwarted. Carriers will be reluctant to enter into

[21] The Executive Branch of the Government and the Civil Aeronautics Board have given effect to this policy in favor of mergers and acquisitions. See Statement of Policy respecting Economic Program of 1949 issued Feb. 26, 1949; Annual Report of the Civil Aeronautics Board, 1950, p. 2; *Eastern-Colonial Acquisition of Assets*, Docket No. 5666, Order No. E-8446, dated June 17, 1954, Appendix 1, p. 1; *Flying Tigers-Slick Merger Case*, 18 CAB 326 (1954); *Continental-Pioneer Acquisition Case*, Docket No. 6457, Order No. E-8803, dated Dec. 7, 1954, p. 3; President's Air Coordinating Committee Report on Civil Air Policy, May 1954, p. 14.

merger and acquisition agreements and to institute the expensive, involved, time-consuming procedures necessary to obtain Board approval if they know in advance that the Board will prolong the proceedings and make them even more hazardous and expensive by inviting to participate their competitors who have absolutely no interest in the original agreement and no contractual exposure. This is particularly true in view of the fact that in a competitive hearing each party theoretically has equal opportunity, whereas in an acquisition proceeding the acquiring airline has contracted for its position and exposed itself to the economic risk. The Civil Aeronautics Board should not be permitted to transcend North Central's constitutional rights under the Fifth Amendment by violating the sanctity of its contract.[12] Such a violation results from both enlarging the limited condition which the statute places upon contracts of acquisition, and from permitting the assignee of the seller to formally and officially violate its contractual commitment to cooperate in obtaining approval by allowing such assignee to pose the most obstreperous opposition to approval.

A consideration of this question by this Court is of extreme importance not only as a guide to the Civil Aeronautics Board in future proceedings before it but also as a guide to other administrative agencies. This is the first time that the Civil Aeronautics Board has openly and flagrantly converted a basic Section 408 proceeding into a competitive one. This Court now has the opportunity to clarify for the Civil Aeronautics Board and the air industry the extent of the Board's authority in the field of mergers and acquisitions. A decision on this point will be a guide for future acquiring and merging carriers in determining whether or not they should enter into such agreements. A decision denying certiorari and

[12] *See Lynch* v. *U. S.*, 292 U.S. 571, 579 (1934).

thereby affirming the Court below and the Civil Aeronautics Board will suppress the desire of air carriers to enter agreements even though they may be in the public interest. This is particularly important in our maturing air transportation system which is constantly attempting to increase efficiency through every means possible, including acquisition and merger. The ultimate effect would be the suppression of the development of the most efficient type of national air transportation system.

B. The Board's Action in Holding Individual *Ex Parte* Conferences with Members of the Lake Central Employee Stockholder Group was an Improper Departure from the Usual Course of Administrative Proceeding, a Departure from this Court's Decisions, and a Violation of North Central's Rights to a Full and Fair Hearing.

The record in this case shows that members of the Lake Central Employee Stockholder Group held individual *ex parte* conferences with Board members prior to entering into an option contract to purchase the Lake Central voting trust certificates (Orig. Rec. 364, 1985, Appendix C). The matters discussed at these conferences were whether or not there was any official objection to the Lake Central Employee Stockholders going forward with their option contract and whether such a program might well be considered as an answer to the question of whether Lake Central should be operated as a separate entity or merged or dismembered. At the very least, these conferences involved a discussion as to the merits of the Lake Central Employee Stockholders' contention that they had an interest in the acquisition case which would allow them to intervene. North Central should have been afforded an opportunity to appear and oppose the Lake Central Employee Stockholders' contention of interest. No such opportunity was afforded North

Central and therefore it was deprived of a full and fair hearing.

Ex parte conferences in judicial tribunals are improper, amounting to reversible error. E.g., *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F.2d 514, 534-535, 540-541 (3d Cir., 1958). Members of administrative agencies are expected to conduct themselves with the same honor and dignity as members of a judicial tribunal. Section 300.1 of the Board's Economic Regulations requires that the Board members and its staff conduct themselves with the same fidelity to standards of propriety that characterize a court and its staff. Section 300.2 of these same Economic Regulations specifically condemns the practice of holding *ex parte* conferences between Board members and other interested persons or parties (Appendix A).

This Court has held that the practice of holding *ex parte* conferences in administrative proceedings is improper. *Morgan, et al.* v. *U. S., et al.*, 304 U.S. 1, 58 S.Ct. 773 (1938). There, Mr. Chief Justice Hughes, speaking for the majority, in a much-quoted opinion, said, 304 U.S. at 19:

> "Congress, in requiring a 'full hearing' had regard to judicial standards not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause the special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing."

The U. S. Court of Appeals for the District of Columbia, in affirming the decision of the Civil Aeronautics Board,

sanctioned the improper *ex parte* conferences of the Board and therefore neglected its responsibility of strictly enforcing the requirement of a full and fair administrative hearing. Such a requirement should be even more strictly enforced against an administrative agency than against the Courts since the administrative tribunal has such broad discretionary power. *Ohio Bell Telephone Company* v. *Public Utilities Commission*, 301 U.S. 292, 304 (1937).

We ask that the Supreme Court use its supervisory powers to remedy the basic impropriety and injustice perpetrated by the Civil Aeronautics Board and sanctioned by the U. S. Court of Appeals in permitting these *ex parte conferences*. This is the same type of thing which prompted this same lower Court to remand another case, *WKAT* v. *FCC*, 258 F.2d 418 (D.C. Cir. 1958), to the Federal Communications Commission for a determination as to whether the parties were prejudiced by similar *ex parte* conferences with a Commission member. The Supreme Court recently granted certiorari in the case of *WORZ, Inc.* v. *FCC*, 79 S.Ct. 114 (1958), and remanded it to the Court of Appeals for appropriate action. The *WORZ Case* also involved *ex parte* conferences at the Commission level. Petitioner submits that unless decisions containing this kind of practice are reversed and remanded, the administrative process will be continually eroded and ultimately destroyed. This Honorable Court should review such cases and clearly establish the proposition that *ex parte* hearings will vitiate an administrative order to the extent that if presented to this Court, it will review and reverse such cases. Such a holding will have a salutory effect on the administrative process and administrative justice. This large and ever-growing field of law should be given the guidance and strength necessary to assure the continued public confidence and support which is necessary for its ultimate survival.

C. The Civil Aeronautics Board's Action in Permitting the Amendment of the Lake Central Voting Trust Agreement without Notice to North Central Deprived North Central of a Full and Fair Hearing under the Fifth Amendment to the Constitution by Departing from the Prior Decisions of the Supreme Court.

In *Ashbacker Radio Corporation* v. *FCC*, *supra*, the Supreme Court held that it is improper for an administrative agency to jeopardize the substantial rights of an interested party where there are mutually exclusive applications by placing that party in the position of having to displace an established licensee. Mr. Justice Douglas, in that case, stated (326 U.S. at 332):

> "As the Fetzer application has been granted, petitioner, therefore, is presently in the same position as a newcomer who seeks to displace an established broadcaster. By the grant of the Fetzer Application petitioner has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing but the practionalities are different for we are told how difficult it is for a newcomer to make a comparative showing necessary to displace an established licensee."

The Court went on to say (326 U.S. at 334):

> "While the statutory right of petitioner to a hearing on its application has in form been preserved, it has, as a practical matter, been substantially nullified by the grant of the Fetzer application."

By allowing the Lake Central Employee Stockholder Group to acquire the Weesners' voting trust certificates, the Board has, as a practical matter, prejudged the North Central-Lake Central Acquisition Case. It placed control of the Lake Central stock in the hands of a party which was acceptable to it, whereas the Wessners had not been acceptable. The issues of the acquisition case were, therefore, changed from *whether the acquisition*

was inconsistent with the public interest to *whether North Central control and operation would be preferable, in the discretion of the Civil Aeronautics Board, to control and operation by the Lake Central Employee Stockholders.* North Central was given the added burden of displacing an established management and ownership which was far superior to that of the Weesners. This was the very evil that the Supreme Court in the *Ashbacker Case, supra,* intended to remedy.

The hierarchy of interests in this case was reversed. Up until this time, North Central had the primary and dominant interest in Lake Central by virtue of its contract with the Weesners. The Lake Central Employee Stockholders had only a "possibility of reverter" standing in the shoes of the Weesners who had contracted to sell to North Central, subject to Civil Aeronautics Board approval, and who had agreed to cooperate in obtaining approval by the Board. The Board made it possible for the Employee Stockholders to become firmly entrenched as "employee owners." North Central was relegated to the secondary position of having to wrench control from the management and some of the employees of Lake Central. This was a much more serious and difficult burden. Moreover, North Central was presented with the anomalous situation where the Lake Central Employees Stockholders were permitted to, and actually did, use the assets of Lake Central to prevent North Central from obtaining those assets (Rec. 144, 168, 180, 450). A review of the Board's action in these respects by the Supreme Court and of the action of the U. S. Court of Appeals in sanctioning such improper actions is the only way in which North Central's constitutional right to a full and fair hearing will be protected. It has now been 14 years since the *Ashbacker* decision was rendered. The evil principle previously condemned is again presented in a slightly different posture. Further guidance by this Court is required if justice is to be done.

D. The U. S. Court of Appeals for the District of Columbia Circuit Improperly Sanctioned an Unexplained Departure by the Civil Aeronautics Board from its Prior Norms Concerning Acquisition and Merger Cases.

The requirements of justice and fair play in administrative proceedings demand that an administrative agency act with a degree of consistency. An agency is acting arbitrarily when it adopts different standards for similar situations. *NLRB* v. *Mall Tool Co.*, 119 F.2d 700 (7th Cir. 1941). An unexplained departure from its prior norms by the Civil Aeronautics Board makes its findings insufficient and thereby precludes the appellate court from fulfilling its statutory obligation to ". . . hold unlawful and set aside agency actions, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Administrative Procedure Act § 10(e) [5 U.S.C. § 1009]. In the case of *Secretary of Agriculture* v. *U.S., et al.*, 347 U.S. 645; 74 S.Ct. 826 (1954), Mr. Justice Frankfurter, in writing the majority opinion, said:

> ". . . While the Commission has adumbrated the reasons that commended these charges to its approval, the Commission has not adequately explained its departure from prior norms . . .
>
> "We do not know whether the Commission has regarded its own findings . . . or whether in order to meet an unusual situation, the Commission has modified the normal doctrine . . ."

If the Civil Aeronautics Board has reached its decision by applying an arbitrary double standard certainly it should be reversed. If it has not given sufficient reasons for its departure from established rules and precedents, its findings are insufficient to allow the courts to properly review them and the case should be remanded for further findings.

In this case, the Civil Aeronautics Board gave two basic reasons for its refusal to approve North Central's acqui-

sition contract. It held: (1) that the North Central and Lake Central areas are ". . . not complementary trade areas. . ." (Rec. 481) and (2) that a merger of the North Central and Lake Central routes would ". . . create a local service system of unprecedented size engendering a tendency on the part of the carrier to concentrate unduly on the long haul traffic . . ." It can be demonstrated that these findings are not only at odds with established Civil Aeronautics Board precedents, holding that neither of them constitute reasons for denial of approval of an acquisition contract, but that they are so much at odds with each other as to constitute an arbitrary and capricious determination.

In the *Arizona-Monarch Merger Case, supra*, the Board held that, "It is not essential that the routes of two companies be complementary." After specifically denying the importance of complementary routes in the *Arizona-Monarch Case, supra*, the Board went on to discuss the important element in a merger or acquisition case. It said:

> "We are of the opinion that the only real issue presented with respect to the question of integration is that which relates to the *economies which would be achieved through the joint use of facilities, equipment and personnel.*" (emphasis supplied.)

The *Arizona-Monarch Case, supra*, was followed by the *West Coast-Empire Case, supra*, where the acquisition was approved. In that case the two carriers' routes did not touch and required certification of several hundred miles of new routes to obtain some possible future traffic integration.

North Central devoted a great deal of time and evidence in this proceeding to showing that there would be economic integration between the two carriers. The Board acknowledged such economic integration and the substantial savings in government subsidies which would re-

sult (Rec. 491), but then ignored this economic integration and decided the case on a question which it had determined to be unimportant in the *Arizona-Monarch Case*, that of whether the route systems or areas of the two carriers are complementary. The Board does not explain its inconsistency. If there is a good reason for this departure from the decision in the *Arizona-Monarch Case* and the *West Coast-Empire Case*, the Board should have set it forth in its opinion. If there is no good reason, the decision is arbitrary and should be reversed.

Furthermore, the Board's findings that the size of the combined North Central and Lake Central systems would militate against the approval of the acquisition is opposed to its prior decisions in favor of increased size where it results in more economical and lower cost operations. *Mississippi Valley Case*, 8 CAB 726, 752 (1947); *Texas-Oklahoma Case*, 7 CAB 481, 537 (1946). In the *Monarch-Challenger Merger Case*, 11 CAB 33 (1949), the Board said:

> "We do not share the concern of these carriers that the increase in size of a feeder carrier *per se* endangers their operation. We have constantly endeavored to avoid establishing competition between trunkline carriers and we see no reason for abandoning that policy. Hence we are not impressed with the argument that the increase in size of the feeder company represents a danger to the so-called regional trunkline operators."

Despite these precedents, the Board in this case found that the acquisition by North Central would be inconsistent with the public interest because it ". . . would create a local service system of unprecedented size with route mileage extending close to 5,000 miles . . ." (Rec. 486). The Board has not previously let the unprecedented size of merged airlines interfere with approval of such mergers. In the *Arizona-Monarch Case*, *supra*, it created a local service carrier (Frontier Airlines) of un-

precedented size. Frontier became the largest local service carrier in the country. Every time Frontier is granted a new route is achieves unprecedented size, yet the Board expresses no hesitancy in granting it additional routes. *Service to Phoenix Case,* Docket No. 6247, Order No. E-11833 (1957); *Williston Basin Area Case,* 18 CAB 873 (1954).

Recently, in the *Seven States Area Investigation,* Docket No. 7454, Order No. E-13254, dated December 8, 1958, the Board increased the route miles served by three carriers, Frontier, Ozark and North Central, so that they now exceed 5,000 route miles. Each of these three carriers, by virtue of the decision in the *Seven States Case,* is now certificated to serve unduplicated route miles equal to more than the combined route mileage served by North Central and Lake Central at the time exhibits were first submitted in this case in September of 1955 or at the time of the decision in this case in July of 1957. Why is the creation of local service carriers of unprecedented sizes in area cases and route certification cases in the public interest, whereas such creation is contrary to the public interest in acquisition cases? Why is Frontier allowed to maintain its status as the largest local service carrier in terms of route miles while North Central is denied authority to acquire Lake Central because the combined systems would comprise more route miles than our largest local service carrier (Orig. Tr. 4275, 4276)? Since the Board has not endeavored to answer these questions and explain its inconsistencies, its findings are insufficient. As already suggested, the reasons given by the Board were not only inconsistent with its prior determinations, but are fundamentally inconsistent with each other. The finding that North Central and Lake Central do not serve complementary trade areas makes ludicrous the conclusion that there would be a tendency, if the acquisition were approved, to concentrate on the long-haul traffic. Moreover, the Board has already imposed a mul-

titude of restrictions in North Central's and Lake Central's certificates to prevent just such situations and to insure the protection of local service.

The U. S. Court of Appeals for the District of Columbia has itself condemned inconsistent action by administrative tribunals. *Hall, et al.* v. *FCC*, 99 U.S.App.D.C. 86, 237 F.2d 567 (1956); *McKay* v. *Wahlenmaier*, 96 U.S. App.D.C. 313, 226 F.2d 35 (1955). Yet in this case it disregarded its own precedents and sanctioned the Board's unexplained departure from prior norms without citing a single authority in support of its action. It said (Rec. 566):

> "We think that the judgment of the Board in this case was not arbitrary and was not a departure from established norms which would have bound it."

Basically, the Court is condoning the improper activity of the Board and attributing it to administrative discretion. But it was impossible for the Court to determine whether the Board was exercising valid administrative discretion because the Board did not explain its inconsistency. The Board's findings were insufficient to allow the Court to properly perform its task of judicial review.

Furthermore, the Court's findings on this point were vague, indecisive and inconsistent. It admits that the Board is bound by prior norms, but inconsistently holds that the agency's discretionary powers, or "judgment," are so broad as to permit it to make unexplained departures from these norms. It allows that the Courts must insure that agencies stay "within the bounds of reason and outside the realm of caprice," yet it does not require that the Board state sufficient "reasons" for its inconsistent action here. It is impossible for petitioner to determine just what the Court is holding when it seeks to bind the Civil Aeronautics Board on prior precedents yet sustains an unexplained departure on the grounds of discretion.

Obviously the lower Court feels that there should be some explanation for the Board's inconsistent action because it attempts to supply lame reasons of its own. It says (Rec. 565) that the Board is entitled to depart from its prior norms with regard to "size" of the merged systems because "size" is a relative term and its importance depends upon the "circumstances." It is these "circumstances" which petitioner seeks to discover. If the Board explains these "circumstances" it has explained its departure from prior norms. If the circumstances are the same in both cases then the Board's action is arbitrary and should be reversed.

The Court goes on to say (Rec. 566) that North Central has not accurately assayed the holding of the Board in the *Arizona-Monarch Merger Case, supra.* It says that the *Arizona-Monarch Case* stands for the proposition that "a merger need not have the effect of increasing the intra-system long hauls." Mergers deal with inter-area problems and certainly would have no effect whatsoever on "intra-system long hauls." Furthermore, "feeder" carriers are limited by the conditions of their certificates to the provision of short haul local service. We submit that it is the Court and not petitioner who has not "accurately assayed" the holding of the *Arizona-Monarch Case.* Moreover, no attempt was made to explain the findings of the Board in the *West Coast-Empire Case, supra,* which also support North Central's contention.

The Court said the Board rested its decision in the *Arizona-Monarch Case, supra,* on other circumstances than the finding that the routes of the companies were not complementary. However, as we assay the decision, the Board said that whether or not the routes are complementary is irrelevant. The Board has therefore based its decision here on a consideration previously held in the *Arizona-Monarch* and *West Coast-Empire Cases, su-*

pra, to be irrelevant. When the other basic finding of "unprecedented size" is found inconsistent with other decisions set forth *supra*, it is evident that both primary reasons for the Board's decision are based on findings previously decided to be irrelevant.

Even if there were other circumstances sufficient to invoke the proper use of discretion in the *Arizona-Monarch* and *West Coast-Empire Cases*, no such circumstances existed here. There was no good reason given which would distinguish the prior inconsistent Board actions. Both primary findings supporting the Board's decision had been previously found irrelevant in considering consistency with the public interest.

As a practical matter, the Court of Appeals affirmed the decision of the Board when it did not have sufficient findings before it to permit it to properly perform its task of judicial review.

The question of how much effect should be given to prior administrative decisions and actions is an ill-defined one. This case represents an excellent opportunity for the Supreme Court to add substance to its pronouncements in the *Secretary of Agriculture Case*, *supra*, that unexplained departures from prior norms constitute insufficient findings. Such a decision by the Court would be invaluable as a guide for all administrative agencies and for the litigants that appear before them.

CONCLUSION

WHEREFORE, petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the District of Columbia Circuit, and upon such review the judgment of said Court of Appeals for the District of Columbia Circuit be vacated, reversed and set aside, and that this case be remanded to said Court with

instructions to proceed further in accordance with the views of this Court.

A. L. WHEELER
1200 Sheraton Building
711 14th Street, N. W.
Washington 5, D. C.
Attorney for Petitioner

Dated: April 28, 1959

PROOF OF SERVICE

I, Asher Louis Wheeler, the attorney for North Central Airlines, Inc., the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of April, 1959, I served copies of the foregoing Petition for Certiorari to the Supreme Court of the United States on the several parties thereto as follows:

1. On the United States, by leaving a copy thereof at the office of O. D. Ozment, Esq., Assistant General Counsel, Litigation and Research, for the Civil Aeronautics Board, at Room 906 of the Universal Building, Washington, D. C., and by mailing a copy in a duly addressed envelope, with first class postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.;

2. On the Civil Aeronautics Board, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Franklin M. Stone, Esq., its General Counsel, at the offices of the Board, Washington, D. C.;

3. On the Lake Central Airlines Employee Stockholder Group, and Lake Central Airlines, Inc., intervening re-

spondents, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

Albert F. Grisard, Esq.
412 Metropolitan Bank Building
Washington 5, D.C.

Attorney for the Lake Central Employees Stockholder Group

James L. Highsaw, Jr., Esq.
Mulholland, Robie & Hickey
Tower Building
Washington, D. C.

Attorney for Lake Central Airlines, Inc.

/s/ Asher Louis Wheeler
ASHER LOUIS WHEELER
1200 Sheraton Building
Washington 5, D. C.

Attorney for North Central Airlines, Inc.

April 28, 1959

APPENDIX A

CONSTITUTION OF THE UNITED STATES, AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL ADMINISTRATIVE PROCEDURE ACT

SEC. 5. [5 U.S.C. § 1004]. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,

* * * *

(b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

* * * *

SEC. 7. [5 U.S.C. § 1006]. * * *

(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy

provide for the exclusion of irrevelant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of facts.

* * * * *

SEC. 8.. [5 U.S.C. § 1007]. In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) *Submittals and decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * *

SEC. 10. [5 U.S.C. § 1009]. • • •

(e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

• • • •

CIVIL AERONAUTICS ACT OF 1938

SEC. 2. [25 Stat. 980, 49 U.S.C. 402] In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

* * * * *

SEC. 401. [52 Stat. 987, as amended by 56 Stat. 265, 61 Stat. 449, 49 U.S.C. 481]

* * * * *

(d)(1) The Authority [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority [Board] may issue a certificate authorizing the whole or

any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder.

• • • • •

(i) No certificate may be transferred unless such transfer is approved by the Authority [Board] as being consistent with the public interest.

• • • • •

SEC. 408. [52 Stat. 1001, 49 U.S.C. 488]

• • • • •

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Authority [Board], and thereupon the Authority [Board] shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Authority [Board] finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe:

• • • • •

SEC. 409 [52 Stat. 1002, 49 U.S.C. 489] (a) After one hundred and eighty days after the effective date of this section, it shall be unlawful, unless such relation-

ship shall have been approved by order of the Authority [Board] upon due showing, in the form and manner prescribed by the Authority [Board], that the public interest will not be adversely affected thereby—

(1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain as officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member or as a stockholder holding a controlling interest, in any person whose

principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

* * * *

PROCEDURAL REGULATIONS

Principles of Practice of the Civil Aeronautics Board

§ 300.0 *Applicability of part.* The principles of practice set out herein to the extent applicable shall govern the relationship between the Board, its staff, and all other persons.

§ 300.1 *Judicial standards of practice.* In many respects the functions of the Board are similar to those of a court and parties to cases before it and those who represent such parties are expected to conduct themselves with honor and dignity. By the same token, the members of the Board, and those of its employees who participate with the Board Members in the determination of cases upon a record, are expected to conduct themselves with the same fidelity to standards of propriety that characterize a court and its staff. The standing and effectiveness of the Board are in direct relation to its observance, that of its staff, and the parties and attorneys appearing before it, of the highest standards of judicial and professional ethics.

§ 300.2 *Hearing cases; improper influence.* It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases:

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

(b) It is likewise improper that there be any private communication on the merits of the case to a member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.

(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14261

NORTH CENTRAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
LAKE CENTRAL AIRLINES EMPLOYEE STOCKHOLDER GROUP
and LAKE CENTRAL AIRLINES, INC., INTERVENORS

On Petition for Review of an Order of the
Civil Aeronautics Board

Decided January 29, 1959

Mr. A. L. Wheeler and *Mr. Marvin Klitsner* of the bar of the Supreme Court of Appeals of Wisconsin, *pro hac vice*, by special leave of Court, for petitioner. *Mr. Emory N. Ellis, Jr.*, also entered an appearance for petitioner.

Mr. Robert L. Toomey, Attorney, Civil Aeronautics Board, with whom *Mr. Franklin M. Stone*, General Counsel, Civil Aeronautics Board, *Mr. John H. Wanner*, Associate General Counsel, Civil Aeronautics Board, *Mr. O. D. Ozment*, Assistant General Counsel, Litigation and Research, Civil Aeronautics Board, *Mr. Ulrich V. Hoffmann*, Attorney, Civil Aeronautics Board, and *Mr. Daniel M. Friedman*, Attorney, Department of Justice, were on the brief, for respondent. *Mr. Morris Chertkov*, Attorney, Civil Aeronautics Board, also entered an appearance for respondent.

Mr. James L. Highsaw, Jr., with whom *Messrs. Clarence M. Mulholland* and *Edward J. Hickey, Jr.*, were on the brief, for intervenor Lake Central Airlines, Inc.

Mr. Albert F. Grisard was on the brief for intervenor Lake Central Airlines Employee Stockholder Group.

Before PRETTYMAN, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

PRETTYMAN, *Chief Judge:* This is an airline acquisition case, here on a petition to review an order of the Civil Aeronautics Board.[1] North Central Airlines, Inc. (which for brevity and clarity we shall call merely "North") sought to acquire a majority of the stock of Lake Central Airlines, Inc. (which we shall call "Lake"). The dispute has been going on for a long time, at least six years, and has many complications and ramifications. We think we need not here go into that background. In September, 1952, North and the stockholders of Lake executed a contract whereby North was to acquire 96 per cent of the stock of Lake. The contract had to be approved by the Civil Aeronautics Board. The Board refused to approve it, and so the case is here.

The key concept in this controversy is "local service" or "feeder service". This is a type of airline operation certificated by the Board upon the "basic principle of fashioning a local service route system on the needs of a given trade area for short-haul and feeder service". The purpose is to provide short-haul services "geared to local needs and maximum development of local traffic" and concentrating the carriers' efforts "on operations in reasonably compact and homogeneous marketing areas." This is a clear and reasonable concept. It is in contradistinction to trunkline service, which operates to carry over long distances with a minimum of stops.

North is certified as a feeder or local service carrier

[1] Sec. 408, Civil Aeronautics Act, 52 STAT. 1001 (1938), as amended, 49 U.S.C.A. § 488.

in the area northwest of Chicago-Detroit. It extends north to the Canadian border and west to Grand Forks-Fargo-Omaha. It has stops at the big cities in the area—such as Milwaukee and Minneapolis-St. Paul—but also at La Crosse, Winona, Clintonville, Ironwood, Thief River Falls, Manitowoc, and many others of like size and character.

Lake is certified as a feeder or local service carrier in the area southeast of Chicago-Detroit. It thus adjoins North on the Chicago-Detroit line. It has stops in the big cities in the area—such as Cleveland, Buffalo and Cincinnati—but also at Erie, Youngstown, Mansfield, Lima, Logansport, Zanesville, Kokomo, Terre Haute, and others of like size and character.

The problem, from the Board's point of view, was whether the combination of these two local feeder services into one operation was inconsistent with the public interest. The Board has long been of the view that the two areas on either side of the Chicago-Detroit line are separate marketing areas and the local traffic requirements are dissimilar. It so decided in 1950 in a case known as the *Parks Investigation Case*.[2] Traffic tends to flow toward and into the big cities—especially Chicago—on feeder services, but not beyond such places on these services. The record in the present case discloses, the Board held, that "the trade centers of Chicago and Detroit serve as a dividing line between the two areas served by North Central and Lake Central, respectively, and that few local travelers proceed beyond these terminals via the local service routes involved." The thrust of the Board's opinion was that the combination of these two areas into one operation, which would then extend from Buffalo-Pittsburg to Grand Forks-Duluth, would violate the whole principle of local or feeder service and would clearly impinge upon trunkline certificates.

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[2] 11 C.A.B. 779.

The Board found, as we have indicated, that there is little inter-area traffic between the two local feeder route services. It found that the combined area would be too big for the sort of concentrated local homogeny desired for local feeder certificates. In the Board's opinion feeder service should be centered in the area to be served and should be soundly integrated for that purpose. In terms of route mileage, number of cities served, density of population, and geographical area covered, the combined carriers would take on characteristics akin to a trunkline carrier and pose a threat to existing trunklines.

The Board said it wanted local feeder carriers to concentrate on local needs and local traffic problems, and it feared that the temptation to woo through traffic over the long distances and between the big cities which would be within the service area of a combined North-Lake operation, would be too insistent to be resisted. The Board found that each of these carriers, North and Lake, is in sizable proportions as a feeder service and each has sufficient room for development in its own area. The Board disagreed emphatically with the examiner in his view that the combination was necessary to preserve Lake, and the Board explained its view in detail, supported by the developing traffic figures.

The Board found that subsidy savings would be effected by the acquisition, if permitted, but that this saving was outweighed by the adverse effects on the overall public interest.

Counsel for North argues that the conclusion of the Board does not follow rationally from the ultimate findings; that the ultimate findings do not flow reasonably from the basic findings; and that the latter are not supported by the evidence as a whole. This is the skillful way of attacking agency orders, being a method of probing each link along the line of agency action. It would unduly prolong this opinion to discuss each of these asserted failures, but we have examined them and think none of them reveals a fatal defect.

The reasoning of the Board seems amply clear. We think the conclusion flows rationally from the ultimate findings, and these in turn rest upon ample basic findings. The latter seem to be supported by ample evidence. Of course there are disputes as to the inferences to be drawn from raw factual data, but it is not our function to draw inferences. Our function is to ascertain whether the inferences drawn by the administrative agency are within the reasonable boundaries prescribed by the facts. We think they are in this case.

With the assistance of supplemental memoranda from counsel for the parties, the court has explored several questions relating to the procedure before the Board, but we find no reversible error in these respects.

North urges that the language of Section 408(b) of the statute raises a presumption in favor of mergers of air carriers. Be that as it may, any such presumption could hardly survive the considered judgment of the Board, as expressed in a case such as the present one, that a particular proposal is not consistent with the public interest.

North says the Board was arbitrary and failed to make sufficient findings when it departed from established norms. For example, North says the proposition that the size of a proposed merged system is immaterial to approval of the merger is an established rule. It refers to a number of cases. But "size" is a relative term, and its importance depends upon circumstances. Because the Board found the size of a merged system immaterial in one case cannot make it an immaterial factor in all cases and under all circumstances. And North says the Board established in the *Arizona-Monarch Merger Case*[3] that feeder routes need not be complementary in order to be merged. It says that in the present case the Board, inconsistently, held the trade areas of the two airlines must be complementary. But we think North does not accurately assay either holding. In *Arizona-Monarch* the

[3] 11 C.A.B. 246 (1950).

Board said that two feeder systems need not be geographically complementary; that is, a merger need not have the effect of increasing the intra-system long hauls. In the present case the Board pointed out, as one feature of the proposed merged system, the lack of inter-area local traffic. But in *Arizona-Monarch* the Board stressed other circumstances. In the instant case the lack of this traffic was one of several critical factors. We find no inconsistency. These problems cannot be solved by a mathematical computation. Judgment necessarily enters into each one, and the Congress has given the agency power to exercise that judgment. As was properly pointed out in the *Southwest-West Coast Merger Case*,[4] the Board is concerned principally with the national air route pattern. This court can and should insure that the agency stays within the bounds of reason and outside the realm of caprice, but the court cannot substitute its own judgment as to what would or would not be inconsistent with the public interest in a proposed merger. We think the judgment of the Board in this case was not arbitrary and was not a departure from established norms which would have bound it.

Affirmed.

[4] 14 C.A.B. 356, 358 (1951).

APPENDIX C

COPY

Law Offices
ALBERT F. GRISARD
412 Metropolitan Bank Building
Washington 5, D. C.

July 29, 1954

Honorable Chan Gurney
Chairman
Civil Aeronautics Board
Washington 25, D. C.

Re: Docket No. 6234

Dear Senator Gurney:

Reference is made to the several conversations Messrs. Gwin Hicks, Lloyd W. Hartman, Robert W. Clifford and the undersigned have had with you and the Members of the Board regarding the acquisition by an employee group of the Weesner stock interest in Lake Central Airlines, Inc. On May 21, 1954, representatives of the employee group and the Weesner family signed a Memorandum of Understanding and Intent, which was subsequently filed with you, setting forth the agreement of the Weesners to grant an option to the employee group for the purchase of the majority stock interest in Lake Central.

As you know, the Weesners through their counsel, Charles S. Murphy, thereafter approached the Board for permission to discuss a sale of the Weesner stock interest to Capitol Airways, Inc., of Nashville, Tennessee. When these negotiations terminated the Weesners then resumed negotiations with the employee group with the result that an option contract was executed on June 25, 1954. Copies of the option contract have been furnished each Member of the Board.

Under such contract, the employee representatives were given 30 days, or until July 25, 1954, to obtain firm com-

mitments from the officers and employees of Lake Central and such other persons as they might designate for the purchase of the entire Weesner stock interest, amounting to 80,954 shares out of 83,039 shares outstanding. These commitments were obtained on July 23, 1954, and written notice thereof given to Mr. Charles S. Murphy on July 26, 1954.

It has been generally understood by the employee representatives that they should make a showing to the Board on or before August 1, 1954, of the existence of (1) the above-mentioned employee stock purchase commitments and (2) commitments from outside sources for the purchase of new securities which would yield the corporation at least $250,000, in order to prevent a dismissal of the show-cause proceeding (Docket No. 6234) for a one-year extension of Lake Central's certificate for Route No. 88. The employee group has made very substantial progress toward obtaining the latter commitments, but has been handicapped in completing the refinancing program by August 1, 1954, because (1) of the time lost while the Weesners explored the proposal of Capitol Airways, Inc., and (2) of the fact that the delay attending the exploration of the Capitol Airways proposal resulted in the employees' refinancing efforts being carried on in a period when many of their investment contacts were vacationing. Under the provisions of the option contract, the employee group has until August 25, 1954, to obtain this necessary additional financing.

Despite these handicaps of short available time and the vacation season, preliminary commitments have already been obtained from businessmen and industries of Mansfield, Lima, Columbus, Toledo and Dayton, Ohio, and active negotiations are now being conducted with similar persons in Indianapolis, Cleveland, Cincinnati, Chicago, Bloomington, Indiana, and Jackson, Michigan. The response has been heartening and the present indications

are that the goal of the refinancing program will be attained within the time allowed by the option contract.

Because of this substantial progress made by the employee group, we respectfully request that the Board defer any further action on Docket No. 6234 or Docket No. 5770 until the refinancing program is completed which, under the terms of the option contract, cannot be later than August 25, 1954. In order that the Members may have a personal, direct knowledge of the progress already made in the brief period since June 25, 1954, we suggest and would welcome the opportunity of an informal meeting next Thursday or Friday (August 5th or 6th) between the Board and representatives of the management and employees of Lake Central. If the Board's schedule does not permit of this joint meeting, it is hoped that Lake Central's representatives may meet with the Members individually on either of such days, at times convenient to the Members.

I shall very much appreciate receiving word from you regarding the foregoing suggestion.

Sincerely yours,

/s/ Albert F. Grisard
Albert F. Grisard
Counsel for Lake Central Airlines, Inc.

Copy: Vice Chairman Harmar D. Denny
Member Oswald Ryan
Member Josh Lee
Member Joseph P. Adams

FILE COPY

Office Supreme Court, U.S.
FILED
MAY 27 1959
JAMES R. BROWNING, Clerk

No. 872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NORTH CENTRAL AIRLINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

LAKE CENTRAL AIRLINES, INC., *Intervenor,*

LAKE CENTRAL AIRLINES EMPLOYEE STOCKHOLDER GROUP, *Intervenor.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR LAKE CENTRAL AIRLINES EMPLOYEE STOCKHOLDER GROUP IN OPPOSITION

ALBERT F. GRISARD
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Washington 5, D. C.
Counsel for Lake Central Airlines Employee Stockholder Group

May, 1959

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR LAKE CENTRAL AIRLINES EMPLOYEE STOCKHOLDER GROUP IN OPPOSITION

OPINIONS BELOW

The opinions and orders of the Civil Aeronautics Board are unreported. They consist of the Board's original opinion and order of July 9, 1957 (No. E-11548), denying petitioner's application to acquire Lake Central Airlines (R. 480-519), and its order of November 1, 1957 (No. E-11932) denying petitioner's request for reconsideration (R. 558-560).

The opinion of the Court of Appeals for the District of Columbia Circuit is unreported and is set forth in Appendix B of the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

In the opinion of the Lake Central Airlines Employee Stockholder Group, the effort of the petition to raise constitutional and statutory questions has no basis in the action of the Civil Aeronautics Board, in North Central's petition to the Court of Appeals to review that action, or in the decision and opinion of that Court. The only issues that have ever been properly involved in this litigation are those posed by North Central's petition for review in the Court of Appeals, the pertinent portion of which is attached to the Brief for Lake Central Airlines, Inc. in Opposition as Appendix A thereto, and by North Central's stipulation of the issues before that Court (R. 1-2), only one of which is presented in the petition for certiorari. The only questions therefore presented by the petition are:

1. Was the Board's disapproval of the proposed acquisition inconsistent with its action in other merger cases?

2. Is further judicial inquiry permissible or required into the questions, which were raised *sua sponte* by the Court of Appeals, which were not raised by petitioner either before the Board or the Court and which, after exploration, the Court of Appeals dismissed?

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Civil Aeronautics Act involved are set forth in the appendix to respondent's brief in opposition. In the opinion of the Lake Central Airlines Employee Stockholder Group, no other statutory or regulatory provisions are involved.

STATEMENT

The facts are fully set forth in the briefs of respondent and Lake Central Airlines in opposition and, in the interest of conserving the time of the Court, will not be repeated here. Respondent's brief sets forth the identity of the Lake Central Airlines Employee Stockholder Group and its interest in this litigation. The Group participated in the case before the Civil Aeronautics Board and intervened, without opposition from North Central, in the proceeding before the Court of Appeals.

ARGUMENT

The Lake Central Airlines Employee Stockholder Group is in complete agreement with, and hereby adopts as its own, the points and argument contained in the briefs of respondent and Lake Central Airlines in opposition.

CONCLUSION

For the reasons set forth in the briefs of respondent and Lake Central Airlines in opposition, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ALBERT F. GRISARD
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Counsel for Lake Central Airlines Employee Stockholder Group

May, 1959

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FILED
MAY 27 1959
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR LAKE CENTRAL AIRLINES, INC., IN OPPOSITION

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May, 1959

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The opinion of the Court of Appeals for the District of Columbia Circuit is unreported and is set forth in Appendix B of the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

In the opinion of Lake Central Airlines, the effort of the petition to raise constitutional and statutory questions has no basis in the action of the Civil Aeronautics Board, North Central's petition to the Court of Appeals to review that action, or in the decision and opinion of that Court. The only issues that have ever been properly involved in this litigation are those posed by North Central's petition for review in the Court of Appeals, the pertinent portion of which is attached hereto as Appendix A, and by its stipulation of the issues before that Court (R. 1-2), only one of which is presented in the petition for certiorari. The only questions therefore presented by the petition are:

1. Was the Board's disapproval of the proposed acquisition inconsistent with its action in other merger cases?

2. Is further judicial inquiry permissible or required into questions, which were raised *sua sponte* by the Court of Appeals, which were not raised by petitioner

either before the Board or the court and which, after exploration, the Court of Appeals dismissed.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Civil Aeronautics Act involved are set forth in the appendix to respondent's brief in opposition. In the opinion of Lake Central no other statutory or regulatory provisions are involved.

STATEMENT

This litigation involves a routine proceeding before the Civil Aeronautics Board on an application by North Central Airlines to acquire control of Lake Central Airlines and merge the operations of the two carriers. It was denied by the Board after full hearing without any challenge by North Central to the regularity of the proceedings. The subsequent petition of North Central to the Court of Appeals to review the Board's action was likewise of a routine character raising only the familiar and oft litigated issues of the adequacy of findings and evidence (R. 1-2).

The North Central application to acquire control of Lake Central raised only a single statutory issue before the Board under Section 408(b) of the Civil Aeronautics Act, i.e., was such an acquisition and merger of the operations of the two air carriers consistent with the public interest.[1] The term "public interest" is in turn defined by Section 2 of the Civil Aeronautics Act and the standards there provided have been given

[1] There was also before the Board an application to establish interlocking relationships between the two carriers which was subject to Section 409 of the Civil Aeronautics Act. This application was incidental to the acquisition and the same standard of the "public interest" was applicable to it.

concrete meaning through almost two decades of administrative practice. Thus, practically all of the matters referred to in petitioner's "Statement of the Case" were irrelevant to the Board's decision and played no part therein.

A hearing on the application in accordance with these standards was held before an Examiner of the Board.

The Board's Bureau of Air Operations actively participated in the proceeding and wrote a brief to the Examiner (R. 429-441) recommending against approval of the acquisition and merger on the grounds that (1) the reason which existed in 1952 for a merger of Lake Central, i.e., the Wesner control, no longer existed; (2) disapproval of the proposal would permit an immediate development of local air service in the Ohio-Indiana area while approval would delay proper development of such service for several years; (3) the acquisition would not accord with the Board's essential reason for establishing local service carriers; (4) Lake Central was showing a steady improvement; (5) the hostility which exists between the two carriers would affect the success of any merger.

The Bureau also expressed the belief "that Lake Central's present management is well qualified". (R. 432)

On June 26, 1956, the Examiner issued his initial decision recommending approval of the proposed acquisition and merger (R. 441-467). The basic finding on which this recommendation rested was the Examiner's belief that Lake Central's system is too small and subject to too much trunkline competition to attain relative self-sufficiency in the foreseeable future so

that a merger was the only alternative to continued subsidy (R. 441-467).

When this recommendation came before the Board, it was opposed by the Bureau of Air Operations (R. 467-470). The Bureau advised the Board of its belief that the management of Lake Central was "skillful and competent" and that the carrier had an opportunity to build a sound independent local air service in the region it served which would be destroyed by approval of the merger (R. 470-478).

When the Board reviewed the matter it unanimously agreed with its Bureau of Air Operations rather than the Examiner. The Board set forth its reasons for disapproving the proposed acquisition and merger clearly and succinctly (R. 482-492). These were:

> (1) North Central and Lake Central were certificated to meet the requirements of separate trade areas for short-haul and feeder type service (R. 484). North Central basically serves the area north and west of Chicago while Lake Central serves the Ohio-Indiana area to the southeast of Chicago. This is in accord with Board policy to authorize operations by local companies whose interests are centered in the area to be served (R. 484-486). The record shows that the two areas served by Lake Central and North Central are not sufficiently related in terms of local traffic requirements to permit a sound integrated local service system. Thus the proposed acquisition would defeat Board policy in the establishment of local service operations (R. 486).
>
> (2) The proposed acquisition would create a large sprawling system of 5,000 miles extending from North Dakota to New York State serving 80 cities. This (a) would disperse management

over too much territory to permit the concentration on local traffic problems that is the essence of Board local service policy; (b) would result in the combined carrier concentrating on lucrative traffic between big cities to the neglect of service to the smaller communities that local service carriers are primarily designed to serve; and (c) would cause North Central to take on the characteristics of a trunk carrier and pose the kind of threat to the trunk lines that Board policy has tried to avoid (R. 486-488).

(3) The proposed acquisition and merger would produce a substantial period of uncertainty and confusion in the affairs of the two companies and jeopardize for an indeterminate period the continued rendition of reliable local service in an important and densely populated local service area. This uncertainty would be prolonged by the hostility existing between the parties (R. 488).

(4) Lake Central and North Central have opportunities for the realignment and expansion of their routes within their respective areas. The Board does not agree with the Examiner's conclusion that Lake Central does not have a reasonable chance of achieving self-sufficiency in the foreseeable future. Since the issuance of the Examiner's initial decision Lake Central's operating results have improved, the carrier has been awarded new route which will strengthen it, and there are pending other routes applications of Lake Central offering further opportunities for expansion (R. 488-491).

(5) While the proposed acquisition and merger could result in sizeable savings in subsidy, this is only one factor to be considered in determining the probable effect of the proposal on the public interest. On balance the Board concludes that it is not sufficient to outweigh the adverse effects upon the public interest, which the Board has found

would result from a merger of the two carriers (R. 490-491).

Thereafter North Central filed a lengthy petition with the Board for reconsideration of the order denying its application (R. 519-544). This petition, with one exception,[2] raised none of the issues upon which the present petition for certiorari is based.

Again when North Central filed its petition in the Court of Appeals for judicial review of the Board's orders the carrier raised only questions with respect to the adequacy of the Board's findings and the evidence to support the findings. (App. A hereto; R. 1-2)

After oral argument in the case, the Court of Appeals by letter dated October 13, 1958, requested the parties to file supplemental briefs on the certain procedural questions which had not theretofore been raised by any party to the proceeding, either before the Board or the court (R. 568).

The Court's subsequent opinion affirming the Board's orders dealt almost entirely with the issues of the adequacy of the findings and evidence which had been raised by North Central. The Court's conclusions on these issues were: (Pet. 39).

> "The reasoning of the Board seems amply clear. We think the conclusion flows rationally from the ultimate findings, and these in turn rest upon ample basic findings. The latter seem to be supported by ample evidence. Of course there are disputes as to the inferences to be drawn from raw factual data, but it is not our function to draw inferences.

[2] Point D in the petition (Pet. 18).

> "Our function is to ascertain whether the inferences drawn by the administrative agency are within the reasonable boundaries prescribed by the facts. We think they are in this case."

The Court likewise could find nothing inconsistent in the Board's action as compared to its action in other acquisition and merger cases (Pet. 39-40).

The Court's disposition of the supplemental issues raised by its letter of October 13, 1958, indicated that its consideration of the briefs with respect to these questions had convinced it that there was no substance to the issues. The opinion disposed of these issues, upon which the petition for certiorari primarily rests, with the following single sentence: (Pet. 39)

> "With the assistance of supplemental memoranda from counsel for the parties, the court has explored several questions relating to the procedure before the Board, but we find no reversible error in these respects."

Lake Central Airlines intervened in both the Board and court proceedings to protect the carrier's interest (R. 62-64). In the Board proceeding the carrier confined its participation to the submission of materials requested by the Board (Tr. 3061-3148).[3] The company supported the Board's orders before the Court of Appeals because it believed that those orders met applicable legal requirements and because a remand would prolong the cloud of uncertainty under which the carrier has been forced to operate during the pendency of the acquisition proceeding, which makes it difficult for Lake Central to secure needed capital (R. 431, 490).

---

[3] Reference is to pages of the original record of proceedings before the Board which has been transmitted to this Court.

ARGUMENT

I

There Is No Conflict of Decision Involved

The decision of the Court of Appeals does not involve any conflict upon any legal point with any decision of another circuit requiring resolution by this Court, nor is any such conflict asserted in the petition.

II

There Is No Important Question of Federal Law Involved

The decision of the Court of Appeals does not involve any important question of Federal law which requires review by the Court.

The petition for review filed by North Central in the Court of Appeals (Appendix A hereto) and its stipulation to the court of the issues raised by that petition (R. 1-2) involved only routine questions of the adequacy of the Board's findings and the evidence to support those findings. The court's disposition of these issues, involving nothing more than an exercise of judicial discretion (Pet. 39), obviously does not give rise to a case requiring review by this Court.

Petitioner has strained to blow one of these issues into an important question of Federal law by claiming that the Court of Appeals sanctioned an unexplained departure by the Board from prior norms used in acquisition and merger cases (Pet. 18-24). However, an examination of the Court of Appeals decision shows that it could find no inconsistency in the Board's action (Pet. 39-40) and expressed the view that North Central did "not accurately assay" the prior Board cases upon which the carrier's argument rested (Pet.

39). Thus, petitioner's issue simply resolves itself into a difference of opinion between itself and the court below on the consistency of the Board's decisions in merger cases. This presents no question necessitating review by this Court.

Petitioner's principal claim that the decision of the Court of Appeals raises important questions of law rests on its contentions (1) that the Board unlawfully turned the acquisition proceeding into a competitive case between prospective purchasers (Pet. 10-13), (2) that the Board unlawfully held *ex parte* conferences with interested parties (Pet. 13-15), and (3) that the Board deprived it of a fair hearing by permitting Lake Central's employees to purchase the Weesner stock subject to the rights of North Central (Pet. 16-17).

Although petitioner now purports to find basic problems of law involved, the fact is that North Central did not raise any of these issues either with the Board or with the Court of Appeals (R. 1, 2, 519-544; Appendix A hereto). It is true that the Court of Appeals *sua sponte* explored the record to determine if any such problems were present and asked the aid of the parties by way of supplemental briefs. However, after this exploration the Court of Appeals found no issues of this nature to be involved and dismissed them in one short sentence (Pet. 39).

III

The Decision of the Court of Appeals Is Clearly Correct

Except for the one sentence disposing of the issues which it had explored *sua sponte*, the Court of Appeals decision related entirely to the issues raised by North

Central's petition for review concerning the adequacy of the Board's findings and the evidence to support those findings. North Central questions the decision on these points only with respect to its claim that the findings on which the Board's action rested departed from previously established norms. The Court of Appeals opinion of this claim (Pet. 39-40) requires no supporting argument. The Court was clearly correct in finding that the claim was factually erroneous and in emphasizing that decisions in these types of cases do not involve mathematical computations but informed agency judgments, which if reasonable, should not be reversed by judicial action.

The Court of Appeals was equally correct in its conclusions concerning the issues it had explored *sua sponte*. North Central's arguments with respect to these issues are based on erroneous statements of fact and significant omissions.

North Central's petition (pages 10-13) assumes that the Board did in fact convert the hearing on its acquisition application into a competitive proceeding between prospective purchasers. The fact is that the Board, acting in response to a motion by North Central, by Order No. E-9404, dated July 18 1955, severed out the North Central applications for approval of the proposed acquisition and for establishment of interlocking relationships and held hearings directed solely to those applications and the issues raised therein (Tr. 475, 481, 484). This fact is clearly shown by the notice of hearing in the proceeding, dated October 12, 1955, which set forth the issues to be heard as follows: (Tr. 579)

> "(1) Whether the acquisition of control of Lake Central Airlines, Inc., by North Central Airlines, Inc., would result in creating a monopoly or monop-

olies and thereby restrain competition or jeopardize a third air carrier and would not be consistent with the public interest pursuant to section 408 of the Act?

"(2) Whether the interlocking relationships of Howard A. Morey, Frank N. Buttomer, Grove Webster, Arthur E. Schwandt, Arthur E. A. Mudler, Joe Decoursin, Francis M. Higgins, Don Olen, Harold Emch, Harold N. Carr, A. L. Wheeler, and Robert B. Stewart, North Central Airlines, Inc., and Lake Central Airlines, Inc., will not adversely affect the public interest within the meaning of section 409(a) of the Act?"

At the beginning of the hearing the Examiner stated that these were the issues (Tr. 544) and they were the only issues to which the Board's opinion is directed (R. 480-519).[4]

North Central's effort to create an *ex parte* conference issue is equally ill founded. This effort is based upon conferences between individual Board members and officers of Lake Central in 1954[5] concerning the stock purchase program of Lake Central employees. At that time Lake Central's operations were under continuing Board supervision embodied in the Board order of December 30, 1952, in the *Indiana-Ohio Local*

[4] North Central's statement (Pet. 8) that the Board in 1955 severed out all applications by prospective purchasers other than that of Lake Central Employee Stockholders and proceeded to hearing involves implications that are untrue. There was not and never has been any application by the Lake Central employee group to be considered as a prospective competitive purchaser and the notice of hearing and the Board's opinion both show that no consideration was given to such a proposition.

[5] Three of the five members of the Board in 1954 were not on the Board in 1957 and did not participate in the unanimous agency decision to disapprove the proposed acquisition.

Service Case, 16 CAB 886, 939, extending the carrier's temporary certificate. This supervision required notification to the Board of various actions and prior Board approval of any changes in the voting trust arrangements under which the extension was granted. The carrier did not want these orders violated by employee stock purchases particularly since its temporary certificate was to expire in a few months on December 31, 1954. The conferences were not clandestine affairs, but were voluntarily made a matter of record in the acquisition case by the Lake Central officer involved (Tr. 1503). The obvious lack of bearing on the acquisition case of such conferences on an unrelated problem is borne out by the fact that North Central's counsel, who authored the present petition, did not even bother to cross examine about the matter although he had full opportunity,[6] and did not at any time mention the matter to the Board in the many briefs and petitions filed in the case (Tr. 1503 et seq., 3914, 4308), nor did he raise any issue with respect thereto before the Court of Appeals (Appendix A hereto; R. 1-2). On these facts the Court of Appeals, after fully exploring the matter, correctly concluded that there was no problem (Pet. 39).

Finally, North Central argues that the amendment of Lake Central's voting trust certificates to permit the employee group to purchase the carrier's stock subject to any rights of North Central deprived it of a fair hearing in the acquisition case because that case was thereby changed into a consideration of the relative merits of North Central control and operation of Lake

[6] If the conferences did in fact disqualify the two remaining Board members from participating in the acquisition case, cross examination would have revealed that fact.

Central as against control and operation by the Lake Central Employee Group. It is contended that this gave North Central the added burden of displacing an established management which is far superior to that of the Weesners. The petition concludes that this action was a violation of the *Ashbacker* doctrine (Pet. 16, 17).

The Board was clearly correct in its view that the question of who held the voting trust certificates during the pendency of the acquisition proceeding was wholly immaterial to the issues in that case. Moreover, there is not one shred of evidence in the Board's findings to support the claim of prejudice. The disapproval of the proposed acquisition and merger was based, not on the superior nature of the Lake Central management, but upon the bad effects of the proposed merger upon local air service in the midwest. In fact the Board stated (R. 482) that in view of its conclusions as to the undesirable effects of the merger "we see no need to discuss the relative merits of the North Central and Lake Central managements." Here again the Court of Appeals correctly dismissed the question.

The failure of North Central to raise the issues before the Board or the Court of Appeals upon which its petition primarily rests, without reasonable grounds for its failure, emphasizes the absence of any of the prejudice to that carrier which is now asserted and brings into play the provisions of Section 1006(e) of the Civil Aeronautics Act and Rule 38(k) of the Court of Appeals rules making unavailable to a litigant objections to agency orders not raised with the agency and in the petition for judicial review of such orders. *Unemployment Compensation Commission*

v. *Aragon*, 329 U.S. 143, 154, 155 (1946); *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 183 F. 2d 975 (D.C. Cir., 1950); *Western Airlines* v. *Civil Aeronautics Board*, 196 F. 2d 933, 936 (9th Cir., 1952), *cert. den.* 344 U.S. 875; *International Brotherhood of Boilermakers, etc.* v. *National Labor Relations Board*, 259 F. 2d 957 (D. C. Cir., 1958).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

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May, 1959

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 14621

NORTH CENTRAL AIRLINES, INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

Petition for Review of Civil Aeronautics Board Orders No. E-11548 and E-11932

To the Honorable Judges of the United States Court of Appeals for the District of Columbia Circuit.

North Central Airlines, Inc. (hereinafter referred to as "North Central" or "Petitioner") petitions for review of final orders entered by the Civil Aeronautics Board (hereinafter sometimes referred to as the "Board"), and in support thereof respectfully shows:

I.

ORDERS TO BE REVIEWED

Petitioner seeks review and annulment of the Board's Orders No. E-11548 dated July 9, 1957 and No. E-11932 dated November 1, 1957, in a proceeding entitled; *North Central-Lake Central Acquisition Case*, Docket No. 5770, et al, (hereinafter sometimes referred to as the "Acquisition Case"). These orders denied the application of Petitioner for the acquisition of the majority stock interest in Lake Central Airlines, Inc. (hereinafter referred to as "Lake Central").

. . . . .

V.

GROUNDS UPON WHICH RELIEF IS SOUGHT

1. The Board's ultimate conclusion in Order No. E-11548, reaffirmed by Order No. E-11932, that the proposed acqui-

sition of Lake Central by North Central, the proposed interlocking directorates and the proposed transfer of Lake Central's certificate of public convenience and necessity would not be consistent with the public interest is (a) unsupported by necessary subsidiary findings; (b) unsupported by substantial evidence; (c) reached by norms inconsistent with those previously found determinative of mergers and acquisitions of airlines (d) reached without a consideration or rejection of Petitioner's contentions that:

(1) The cities in the Lake Central system would be provided with 44% more service if the acquisition is approved, and at a savings of nearly a half million dollars annually;

(2) North Central's forecast of 12,848 passengers in the area who would be convenienced by approval of the proposed acquisition; and

(3) The superiority of North Central's financial position enabling it to render improved and increased service over the Lake Central system, all in accordance with the public interest.

(e) arbitrary, capricious and an abuse of discretion, all contrary to the requirements of Section 10(e) of the Administrative Procedure Act, (5 USC 1009)(e) and Section 1005(e) of the Civil Aeronautics Act (49 USC 645(e)).

2. The subsidiary findings and conclusions of the Board as set forth in the Board's opinions accompanying its orders No. E-11548, dated July 9, 1956 and No. E-11932, dated November 1, 1957, do not support the ultimate conclusion. Further, these findings are: (a) unsupported by necessary subsidiary findings; (b) unsupported by substantial evidence; (c) reached by norms inconsistent with those previously found determinative of mergers and acquisitions of airlines; (d) contradictory; and (e) arbitrary, capricious

and an abuse of discretion, all contrary to the requirements of Section 10(e) of the Administrative Procedure Act (5 USC 1009) (e) and Section 1005(e) of the Civil Aeronautics Act (49 USC 645(e)).

3. In making its decision, the Board did not consider, recognize or even refute Petitioner's contentions that:

(a) The cities in the Lake Central system would be provided with 44% more service if the acquisition is approved, and at a savings of nearly a half million dollars annually;

(b) North Central's forecast of 12,848 passengers in the area who would be convenienced by approval of the proposed acquisition; and

(c) The superiority of North Central's financial position enabling it to render improved and increased service over the Lake Central system, all in accordance with the public interest.

* * * * *

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FILED
MAY 23 1958
JAMES R. BROWNING, CLERK

No. 872

In the Supreme Court of the United States

OCTOBER TERM, 1958

NORTH CENTRAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. B) is not yet reported. The findings and orders of the Civil Aeronautics Board (R. 480–519, 558–560) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1959. The petition for a writ of certiorari was filed on April 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Civil Aeronautics Board disapproved petitioner's acquisition of the majority stock of Lake

Central Airlines on grounds that the routes of the two local service carriers were not complementary and a merger would endanger petitioner's continued concentration upon local service needs. The management of Lake Central had been found not to meet the statutory test of fitness, and the carrier's authority to continue in operation had been renewed only after the principal owners had been removed from control through placing their stock in a voting trust pending consideration of its acquisition by petitioner or other appropriate disposition. The Board subsequently permitted a modification of the voting trust, making possible a contingent sale of the stock, subject to petitioner's previously acquired rights, to a group of Lake Central employees. It also permitted the contingent purchasers to intervene in the acquisition proceedings. The questions are:

1. Whether the Board improperly converted the acquisition hearing into a comparative proceeding between petitioner and the Lake Central employees' group.

2. Whether the Board's modification of the voting trust agreement to permit the contingent purchase prejudiced the rights of petitioner in the acquisition proceeding.

3. Whether the Court of Appeals properly found no error in certain conversations, occurring prior to the acquisition hearing, between Board members and the employees' group concerning the possibility of the latter's conditional acquisition of Lake Central stock.

4. Whether the Board's determination that petitioner's acquisition of Lake Central would be incon-

sistent with the public interest was improper.

STATUTE INVOLVED

The relevant provisions of the Civil Aeronautics Act of 1938, as amended,[1] are set forth in the Appendix, *infra*, pp. 17–21.

STATEMENT

Petitioner and Lake Central Airlines are subsidized local service air carriers.[2] During proceedings in 1951 on Lake Central's application for renewal of its then temporary certificate of public convenience and necessity and for expansion of its system (*Indiana-Ohio Local Service Case*, Docket 4034), evidence indicating misconduct on the part of the carrier's management (members of the Weesner family who owned more than 95% of the stock) led the Board's examiner to find that Lake Central was not "fit" to receive continued operating authority.[3] Apparently apprehending unfavorable action by the Board as a result of this finding, the Weesners, on the eve of oral

[1] The provisions of the Civil Aeronautics Act here involved were reenacted without material change in the recent Federal Aviation Act of 1958 (72 Stat. 731, *et seq.*), which became effective on December 31, 1958. Since Section 1501(c) of that Act provides that its provisions are inapplicable to pending cases, we refer only to the provisions of the 1938 Act.

[2] Local service carriers are certificated primarily to meet the need of smaller cities for local and short-haul services to their principal trading centers and for connection with the "trunk-lines" for long-haul services.

[3] Section 401(d) of the Act (*infra*, p. 18) imposes, as conditions to certification, that the carrier be "fit, willing, and able" to perform the transportation service and "to conform to the provisions of this Act and the rules, regulations, and requirements of the [Board] * * *."

argument before the Board, contracted with petitioner for sale to the latter of their Lake Central stock (R. 46–62),[4] subject to the Board's approval under Section 408 of the Civil Aeronautics Act (*infra*, pp. 19–21). Shortly thereafter, petitioner filed with the Board formal application (Docket No. 5770) for such approval (R. 43–46, 54).

Following oral argument in the renewal proceedings, the Board found that the public convenience and necessity required both continued operation of Lake Central's route and its extension, but that because of the evidence of managerial misconduct it was unable to make the requisite statutory finding of fitness (*Indiana-Ohio Local Service Case*, 16 C.A.B. 944).[5] Adverting to the North Central-Weesner contract, the Board stated that such transfer of control might eliminate the fitness problem but pointed out (16 C.A.B. at 947) that approval of that contract was required under Section 408 which:

> * * * requires a hearing to determine whether the proposal is itself in the public interest. Such a proceeding is likely to take from 6 to 18 months, especially if more than one buyer should evidence an intention to reach agreement with Lake Central's management on reasonable terms for acquisition of such control. We

[4] The designation "R" refers to the joint appendix filed in the Court of Appeals. Portions of the original record, which were not printed in the joint appendix, are referred to as "TR." Both the original record and the joint appendix have been filed in this Court.

[5] The Board noted that there was no question of "operational fitness," and that the problem related to various activities by carrier's management in violation of the Act.

> would be remiss in our obligation under the Act if we did not now take reasonable steps to provide during this interim period the services which are required by the public interest.
>
> In these circumstances we believe it entirely consistent with the public interest for us to provide an opportunity to the present owners of Lake Central to make what would be considered an offer of settlement if this were an enforcement proceeding. The parties now owning and managing Lake Central have already evinced a desire to withdraw from this company by their execution of the aforesaid merger agreement. Were they to provide through a voting trust an interim substitute management under the direction of a trustee who could be approved by the Board to hold office until the Board should approve either the acquisition of control by [North Central], or some comparable arrangement whereby permanent divestiture of control would be effected, the questions as to the carrier's fitness could be resolved for this interim period.

Within thirty days the Woesners executed such a voting trust agreement, which was accepted by the Board as a basis for an interim finding of fitness. Lake Central's certificate was temporarily renewed, the Board retaining jurisdiction over the trust, and requiring its approval for any modification or changes therein (16 C.A.B. at 887–890, 943).

In the preliminary stages of the acquisition proceeding, a number of other carriers requested consolidation therein of applications to be considered as potential transferees of Lake Central's stock as well

as of applications, including one by North Central for certificates of public convenience and necessity for the routes then served by Lake Central. The Board originally consolidated these other transfer applications with the North Central acquisition docket (Tr. 301) for consideration as potential transferees of the Lake Central stock or routes "in the event [the North Central] agreement is disapproved * * * or in the event of the failure of performance of said agreement by either or both of the parties thereto." (Tr. 306.) Subsequently, however, at the request of North Central and Lake Central the issues in the acquisition hearing were limited to the merits of North Central's proposed acquisition. (C.A.B. Order No. E-9404, Tr. 484.)

Before the acquisition proceeding was reached for hearing, petitioner's financial position had deteriorated to the point of "virtual bankruptcy" (Tr. 897), and there were various postponements in the case at the petitioner's request. There was doubt that petitioner would be able to perform its contract if Board approval were obtained, and the Weesners were taking the position that the contract in any event had been breached and were trying to salvage their investment by a contingent sale to some one else.[1]

[1] The Weesners' position was that the application by North Central for certification for the Lake Central routes constituted a breach as an attempt by petitioner to obtain the routes other than by the contract. This ground, and the one of unwarranted delay occasioned by petitioner, were later urged in an action to obtain a judgment declaring the contract terminated. The District Court agreed but the Court of Appeals reversed. *Hartman v. North Central Airlines*, 144 F. Supp. 885 (S.D. Ind.), reversed, 241 F. 2d 856 (C.A. 7). The opinions therein

A group of Lake Central employees, fearful that the proceeding "was going forward aimed primarily at dismemberment of the airline" (R. 499), developed a program for purchase of the stock from the Weesners. In 1954, the record shows that there were informal conferences between representatives of the employee group and individual Board members as follows (Tr. 1985):

> * * * Before proceeding forward any further with the development of the employee stock purchase program we had informal conferences with each member of the Civil Aeronautics Board in order to ascertain whether or not there was any official objection to our going forward with the stock purchase program, conditioned of course upon the prior rights, if any, of North Central Airlines.
>
> We received no discouragement and were advised that such a program might well be considered as an answer to the question of whether Lake Central should be operated as a separate entity or merged or dismembered.

In June 1954, the employees entered into an option contract with the Weesners for the purchase of the latter's Lake Central stock, subject to the earlier contract with petitioner (R. 302–206), and on October 27, 1954, the Board granted the employees' group leave to intervene in Docket 5770 (the proceeding for approval of petitioner's acquisition contract) (Tr. 430).

---

depict the activities of the parties during the period prior to the hearing in the acquisition proceeding, and the District Court's opinion contains a full summary of petitioner's then financial plight (144 F. Supp. at 907–910).

Since the employees did not fall within the purview of Section 408, there was no statutory requirement for Board approval of their immediate acquisition of the stock. Exercise of the option, however, would have run afoul of the provisions of the voting trust agreement which provided that transfer of more than 75% of the trust certificates would terminate that agreement. Termination, also, required Board approval, and this the Board had already refused to give (Tr. 430). Accordingly, the parties to the voting trust agreement executed an amendment thereto which in effect provided for its continuation notwithstanding transfer of 75% of the trusteed stock or trust certificates to new owners. On January 11, 1955, formal application for approval of this amendment was filed in Docket No. 4034 (the old *Indiana-Ohio* case in which the trust agreement had been approved), and approval was granted on February 3, 1955, by Order No. E–8931. The order expressly subordinated the employees' rights to those of North Central, and further found that the Board's action "will not adversely affect the legal rights of any * * * person." The option was exercised, and the trust certificates were transferred to the employees.[1]

After hearing on petitioner's proposed acquisition of Lake Central, the examiner recommended approval

[1] Petitioner subsequently sought rescission of the Board's approval of the voting trust amendment, claiming, *inter alia*, that it had not been served with a copy of the application. The Board refused, pointing out that petitioner was not a party to the proceeding in which that action had been taken, and that it had not been prejudiced either substantively or procedurally (Order No. E–9404). (Tr. 484.)

thereof (R. 482–483). The Board, however, unanimously rejected his recommendation, finding that the acquisition would be inconsistent with the public interest (R. 484–492). The Board found that the two carriers serve separate trade areas having little local service traffic integration, and that unification of the two systems would thus result in a single carrier operating two separate local service systems. This would conflict with a long-established Board policy of confining local service carriers to a single, reasonably compact and homogeneous marketing area in order to assure maximum concentration upon the local service needs for which they are certificated (R. 489). These factors were held to outweigh the subsidy savings which would result from the merger (R. 491).

On review, the Court of Appeals affirmed the Board's conclusions as supported by adequate findings resting upon substantial evidence. It found no inconsistency between the Board's action here and in other merger cases, and concluded that, in exercising its judgment as to the public interest in approving or disapproving the merger, the Board had acted within its reasonable discretion.

Petitioner, although objecting before the Board, did not urge error on appeal with respect to the intervention of the employees' group; the amendment of the voting trust to permit the continuent stock acquisition; or the alleged conversion of the acquisition hearing into a comparative proceeding among all potential purchasers of Lake Central. It made no claim of error before either the Board or the Court of Appeals with respect to the Lake Central employees' group's

conversations with the Board members. However, the court, *sua sponte*, requested further briefing on these questions. The parties responded, and the court stated with respect thereto (Pet. App. B. 39):

> With the assistance of supplemental memoranda from counsel for the parties, the court has explored several questions relating to the procedure before the Board, but we find no reversible error in these respects.

ARGUMENT

1. Contrary to petitioner's contention, this case presents no issue concerning the Board's power to convert acquisition proceedings into comparative assessments of the benefits of various proposals for taking over the business or routes of Lake Central. The proceedings, in conformity with established Board policy,* were directed only to the issue of whether petitioner's acquisition of Lake Central was consistent with the public interest.

The Board did permit intervention by the Lake Central employees' group. But clearly the employees group, as holders of a contingent interest in the controlling Lake Central stock, had standing to intervene. See *Federal Communications Commission* v. *Sanders Radio Station*, 309 U.S. 470, 476-477; *Granik*

*The Board in merger cases has never afforded comparative consideration to other potential applicants in the sense of determining whether it should deny an acquisition which is consistent with the public interest because another proposed plan of merger might be still more so. Instead, the Board has first independently appraised the merger contract before it. Only if its grant is found to be contrary to the public interest have other possible alternatives been explored. (See Tr. 306.)

v. *Federal Communications Commission*, 234 F. 2d 682 (C.A.D.C.). And having standing, they were entitled to urge, as they did, public interest consideration which militated against the merger. This did not convert the proceeding into a comparison between the petitioner and the employees. The Board found that the acquisition of Lake Central by petitioner, considered by itself, would be contrary to the public interest for reasons wholly extraneous to any control of Lake Central by the employees' group. While the Board necessarily considered the ability of Lake Central to operate as an independent carrier in view of petitioner's contentions that its alleged inadequacies were a reason for approving the merger (R. 551), none of the factors upon which the Board predicated its conclusions that the merger would not be consistent with the public interest relates to the relative merits of Lake Central's ownership by North Central as opposed to its ownership by the employees.

2. Likewise, the earlier approval by the Board of the Lake Central employees' contingent purchase of the Weesner stock did not in any way prejudice petitioner's rights to a fair consideration of its acquisition application. Since the employee's group does not fall within the purview of Section 408 of the Civil Aeronautics Act, 49 U.S.C. 488, there was no statutory requirement for Board approval of their contingent acquisition of the controlling Lake Central stock, nor any statutory prohibition against the transfer to them of such stock. Board approval was required solely as a result of the terms of the trust agreement imposed by the Board upon the Weesners

as a condition to the continued certification of Lake Central. Petitioner was not a party to that agreement, and it was not designed for petitioner's benefit but solely to insure that the Weesner family did not resume control of Lake Central. Since the transfer of their stock interest to the employees would not be a device for subverting the purpose of the trust agreement, and since the purchase and transfer were expressly made subject to the prior rights of petitioner, the Board's approval of a modification of the trust agreement to permit the contingent sale and transfer was clearly appropriate and did not in any way increase petitioner's burden in the acquisition proceeding. See *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327.

3. While petitioner never raised the matter before the Board or in its appeal below, the court, *sua sponte*, requested the parties to submit supplemental memoranda as to the validity of the Board's decision in the light of certain *ex parte* statements and conversations between the Lake Central employees' group and individual members of the Board prior to the acquisition hearing. Upon consideration of these memoranda, however, it concluded that "we find no reversible error in these respects" (Pet. App. B 39).

The nature of the *ex parte* contacts was spread upon the record of the acquisition hearing (see Tr. 364, 1985). They involved conversations between the employees' group and members of the Board in 1954 prior to the consummation of their contingent purchase of

the Weesner stock, and were primarily directed to the separate proceeding on Lake Central's basic qualifications which had resulted in renewal of its certificate only upon condition that the Weesners be removed from control of Lake Central through the means of the voting trust. The employees' group sought advice from the Board (1) as to any "objection to our going forward with the stock purchase program, conditioned of course upon the prior rights, if any, of North Central" and (2) whether such purchase could be "considered as an answer to the question of whether Lake Central should be operated as a separate entity or merged or dismembered" (Tr. 1985). The requests were natural ones in view of the fact that at the time North Central was in serious financial difficulties and doubt existed as to whether it would or could continue to press for the merger, and since it was not clear whether the contingent purchase was permissible under the then existing terms of the voting trust. There are no facts indicating any *ex parte* presentation with respect to the merits of the acquisition proceeding or in any way prejudicial to the recognized "prior rights" of North Central.

The situation here differs markedly from that presented in *Sangamon Valley Corp.* v. *United States*, 358 U.S. 49, and *WORZ* v. *Federal Communications Commission*, 358 U.S. 55, where this Court remanded cases involving decisions of the Federal Communications Commission to the Court of Appeals for further consideration in the light of information, arising subsequent to the decisions of the lower court, indicating

that *ex parte* presentations had been made to Commissioners. (1) In the F.C.C. cases, the communications related to the merits of a pending case. In the instant case, the conversations between the Board members and the employees' group did not relate to the merits of the North Central acquisition. The purpose of the discussions was not to influence the Board's decision in the North Central acquisition case, but to ascertain whether, if the North Central acquisition did not take place, the Board would view the employees' proposal as an alternative method of compliance with the Board's prior order requiring termination of the Weesners' relationship with Lake Central. (2) In the F.C.C. cases, the discussions took place at a time when the pending cases which they concerned were under active consideration by the Commission. In the instant case, they occurred at a time when the acquisition proceedings were dormant and when it appeared that, because of North Central's critical financial position, they were unlikely ever to come under active consideration. (3) In the F.C.C. cases, the *ex parte* conversations were secret and clandestine, and were brought to light not during the agency or judicial proceedings, but in investigation proceedings before a Congressional committee. In the instant case, the fact of the *ex parte* discussions was made a matter of public record set forth in the hearing before the agency, and was known to all the parties but challenged by none of them.

Here the Court of Appeals, which is especially alert in dealing with questions of this character,[9] has on its own initiative fully examined into a matter which petitioner did not deem of sufficient import to raise before either the Board or the court below, and has determined that no grounds existed for remanding the case because of the *ex parte* conversation between the employees' group and the Board members. Since the matter has been thoroughly canvassed in the court below, and since that court has concluded that the facts with respect to the *ex parte* presentations in the instant case do not warrant remand to the agency involved, as has been ordered in other cases, the decision below does not appear to call for review here.

4. The Court of Appeals' approval of the Board's decision on its merits clearly presents no question warranting review by this Court. Petitioner's contentions that the Board's decision departed from established "norms" applied in similar cases, and was not supported by substantial evidence or adequate ultimate or basic findings of fact, were fully considered by the court and found to be lacking in merit. As the court below held, the Board's determination that a merger of two non-complementary local service

[9] In *Sangamon*, the Court of Appeals, on May 8, 1959, remanded the case to the Federal Communications Commission to hold an evidential hearing into the various *ex parte* presentations. See also *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 261 F. 2d 55 (C.A. D.C.), and *WKAT, Inc.* v. *Federal Communications Commission*, 258 F. 2d 418 (C.A. D.C.), where the Court of Appeals had remanded proceedings to the Commission to explore charges of *ex parte* presentations in adjudicatory proceedings while they were in hearing status.

"feeder" carriers would not be consistent with the public interest for the basic reasons for which such carriers are certificated, was wholly within the bounds of the Board's reasonable discretion under the Civil Aeronautics Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Civil Aeronautics Board.

MAY 1959.

APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended (49 U.S.C. 401, *et seq.*) are as follows:

DECLARATION OF POLICY

SEC. 2 [49 U.S.C. 402] In the exercise and performance of its powers and duties under this Act, the Authority [Board] shall consider the following; among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate, transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

CERTIFICATE REQUIRED

SEC. 401. [49 U.S.C. 481] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation: * * *

* * * * * *

ISSUANCE OF CERTIFICATE

(d)(1) The Authority [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority [Board] may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules

regulations, and requirements of the Authority [Board] hereunder.

* * * * *

CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

ACTS PROHIBITED

SEC. 408 [49 U.S.C. 488] (a) It shall be unlawful unless approved by order of the Authority [Board] as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever,

of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

POWER OF AUTHORITY [BOARD]

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Authority [Board], and thereupon the Authority [Board] shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Authority [Board] finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided*, That the Authority [Board] shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further*, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or af-

filiated therewith within the meaning of section 5(8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Authority [Board] shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

JUDICIAL REVIEW OF AUTHORITY'S [BOARD'S] ORDERS

ORDERS OF AUTHORITY [BOARD] SUBJECT TO REVIEW

SEC. 1006. [52 Stat. 1024, as amended by 63 Stat. 107, 49 U.S.C. 646]

* * * * *

FINDINGS OF FACT BY AUTHORITY [BOARD] CONCLUSIVE

(e) The findings of facts by the Authority [Board], if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority [Board] shall be considered by the court unless such objection shall have been urged before the Authority [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE 1959

FILE COPY

JUN 3 1958

Supreme Court of the United States

October Term, 1958

North Central Airlines, Inc., Petitioner,

v.

Civil Aeronautics Board, Respondent,

Lake Central Airlines, Inc., et al., Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF NORTH CENTRAL AIRLINES, INC. TO THE BRIEFS OF RESPONDENT AND INTERVENORS

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In The

Supreme Court of the United States

January Term, 1959

No. 872

North Central Airlines, Inc., *Petitioner*

v.

Civil Aeronautics Board, *Respondent*
Lake Central Airlines, Inc., *Intervenor*
Lake Central Employee Stockholder Group, *Intervenor*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF NORTH CENTRAL AIRLINES, INC. TO THE BRIEFS OF RESPONDENT AND INTERVENORS

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States.

I. COUNTER-STATEMENT OF THE FACTS

Petitioner (North Central Airlines, Inc.) has stated the facts in its Petition for Certiorari. We stand on that statement. Petitioner finds it necessary, however, to point out several inadequacies in the statements made by Respondent and the Intervenors.

On Page 6 of its Brief, the Solicitor General implies that the Petitioner was virtually bankrupt and that because of this virtual bankruptcy it applied several times for postponements. The statement and inference is false. North Central was always in a position to fulfill its contract with the Weesners. Testimony was adduced both before Judge Steckler of the United States District Court for the Southern District of Indiana (*Hartman* v. *North Central Airlines, Inc.*, 144 F.Supp. 885) and before Trial Examiner Pfeiffer to the effect that North Central would have had no difficulty in paying the purchase price of $80,000 (Rec. 498, 499). Moreover, there was a specific provision in the contract which enabled North Central to assign its contract to its officers or its directors and the Purdue Research Foundation most of whom were capable and desirous of individually paying for the Lake Central stock. (Rec. 58, ¶10).

The postponements which the Justice Department referred to were postponements requested by North Central because of the fact that its key witnesses were out of the country and because of the imminence of the publication of the Lake Central mail rate decision (Orig. Tr. 311, 355, 359). This decision was obviously pertinent as the price to be paid for the stock was based upon this decision (Rec. 55). At no time was a postponement requested or granted because of purported financial distress.

The actual situation was the contrary of that implied by the Respondent. In March of 1954, two and one-half month before the Lake Central Employee Stockholders had their *ex parte* conferences with the Board concerning their approval of their agreement to purchase the Lake Central stock, North Central, in answer to a request by the Hearing Examiner, stated in writing that it was ready and willing to proceed with the acquisition hearing (Orig. Tr. 362). The facts are that both Lake Central and the Lake Central Employee Stockholders requested delays in the hearing and prevented North Cen-

tral from obtaining a hearing until they had perfected their organization and petitioned the Board themselves for the hearing (Orig. Tr. 364, 366). During this period, North Central moved several times for an expedited hearing (Orig. Tr. 443, 453, 481).

Lake Central's statement of the facts apparently finds North Central's statement objectionable as not relating to public interest considerations set forth in Section 2 (LCA Brief, pp. 3 and 4). It is our contention that the facts cited in our Petition relate directly to public interest considerations. This is supported by the Department of Justice's Brief, which recites in its statement of facts many of the facts alluded to by Petitioner.

Counsel for Lake Central states on Pages 4 and 5 that the size of Lake Central was the controlling consideration in the determination by the Examiner that the acquisition would be in the public interest. This is contrary to the findings of th Trial Examiner, which were based on this and a number of other considerations (Rec. 441-467). To us, the primary basis of the Examiner's decision was that North Central offered the Lake Central cities more service at less cost to the Government than would continued operation by Lake Central (Rec. 452-457).

On Page 5 of the Lake Central Brief, it attempts to elevate the Bureau Counsel's position to the same level as an initial decision by the Trial Examiner. Obviously the position of the Bureau of Air Operations, a party to the proceeding, has not the same status as that of a Trial Examiner, an impartial arbiter having a position similar to that of a trial judge. This attempt on the part of Lake Central to elevate the position of the Bureau is misleading.[1]

[1] Despite the Board's finding that Lake Central could make substantial progress toward self-sufficiency within a reasonable time, Lake Central is still one of the smallest, highest-cost, highest-subsidized carriers and North Central is still one of the largest, lowest-cost, lowest-subsidized operators.

II. THE BOARD IMPROPERLY CONVERTED THE ACQUISITION HEARING INTO A COMPETITIVE PROCEEDING BETWEEN PETITIONER AND THE LAKE CENTRAL EMPLOYEE STOCKHOLDER GROUP.

Neither Lake Central nor the Lake Central Employee Stockholders seriously treat this contention of North Central. The Department of Justice, on Pages 10 and 11 of its Brief, attempts to justify the Board's action in permitting the intervention of the Employee Stockholder Group on the basis of their interest in the proceeding. It is North Central's contention that the Board committed serious and grave error in permitting the modification of the voting trust agreement which enabled the Employee Stockholder Group to obtain an interest in the proceeding. This request for a modification of the voting trust should not have been heard prior to the acquisition case. What is even worse, the voting trust was modified without notice to North Central and an opportunity for North Central to be heard in opposition.

Respondent also states on Page 11 of its Brief: "The Board found that the acquisition of Lake Central by Petitioner considered by itself would be contrary to the public interest for reasons wholly extraneous to any control of Lake Central by the Employee Group." We have searched the Opinion and are unable to agree with this position of the Department of Justice. When the Lake Central Employee Stockholders urged that the acquisition be disapproved and presented public interest considerations in support of their position, these considerations included competitive considerations. Obviously the inclusion of competitive considerations whether they be couched in terms of public interest or otherwise in fact converted the hearing into a competitive hearing. This is evidenced by the fact that the Board compared the management of Lake Central and North Central (R. 428).

compared the subsidy savings resulting from the acquisition (R. 4280), and decided that the strengthening of Lake Central could better be achieved through route extensions rather than through the proposed merger (R. 4278). It seems to us quite immaterial whether these considerations involved public interest as well as competitive considerations. If the hearing becomes a competitive hearing for any reason, we consider the Board has transcended its powers.

III. THE BOARD'S MODIFICATION OF THE VOTING TRUST AGREEMENT TO PERMIT THE PURCHASE OF LAKE CENTRAL PREJUDICED THE RIGHTS OF PETITIONER IN THE ACQUISITION CASE.

We have previously alluded to the prejudice North Central suffered by the Board's authorizing a modification in the voting trust prior to the determination in the Acquisition Case. See Page 3, *supra*, and Pages 16-17 of our Petition for Certiorari. The Board, contrary to the pronouncement of the Supreme Court in *Ashbacker Radio Corporation v. F.C.C.*, 326 U.S. 327, caused Petitioner to suffer a serious handicap and increased burden when it changed the status of the parties and the issues in this case prior to a hearing on the merits. Even more abhorent is the fact that the Board accomplished this without giving North Central an opportunity to object by the almost facetious finding that North Central has no interest in such matters.

IV. THE BOARD'S ACTION IN HOLDING INDIVIDUAL EX PARTE CONFERENCES WITH MEMBERS OF THE LAKE CENTRAL EMPLOYEE STOCKHOLDER GROUP WAS AN IMPROPER DEPARTURE FROM THE USUAL COURSE OF ADMINISTRATIVE PROCEEDING, A DEPARTURE FROM THIS COURT'S DECISIONS, AND A VIOLATION OF NORTH CENTRAL'S RIGHTS TO A FULL AND FAIR HEARING.

Lake Central and the Lake Central Employee Stockholders contend that because Lake Central is being managed under a voting trust agreement subject to the Board's supervision, they can confer *ex parte* with the Board on this and other cases. This proposition is obviously absurd on its face. Lake Central or its Employees have no right to confer *ex parte* with the Board for any reason on pending competitive cases irrespective of the trust relationship. Moreover, the fact that these *ex parte* conferences were later made public does not expunge their prejudice or cure their transgressions. No place in the Department of Justice's Brief or the Lake Central Employee Stockholders Brief is there a denial that the conferences took place as the evidence in the record is clearly to the contrary. The defense is made that the individual *ex parte* conferences with the Board members did not involve the merits of this case. The record is clearly to the contrary. The conferences involved any official objection by the individual members to a stock purchase program by the Employees and whether the Lake Central Employee Stockholders' proposal should be considered as an alternative to the merger or dismemberment of Lake Central. Obviously these questions involve issues to be determined by the Acquisition Case. In order to determine whether the Lake Central Employee Stockholders' proposals should be considered as an alternative, it was obviously necessary to consider the content of that proposal along with North Central's

contract. This is an *ex parte* discussion on the merits. If the discussion centered around whether the Employees should go forward with the stock purchase plan this presupposes that North Central would not go forward with its contract. This equally is an *ex parte* discussion on the merits and is contrary to established judicial norms. We are not naive enough to believe that *ex parte* conferences involving these serious administrative questions were so sterile as to have no detrimental effect on North Central. Even if they were not discussions on substance, *ex parte* discussions as to procedural right to intervene are just as much a discussion on the merits as the substantive questions.

All these *ex parte* conferences took place during the time when North Central's application for approval had been filed with the Civil Aeronautics Board, an examiner assigned, a prehearing conference held, motions and counter-motions filed, and exhibit dates set. Moreover, North Central had informed the Board in writing that it wished to go forward with the merger (Orig. Tr. 362). At no place in the record in this case or in the case before Judge Steckler in the United States District Court for the Southern District of Indiana (*Hartman* v. *North Central Airlines, Inc., supra*) was there any evidence that North Central had any intention but to go forward with the case. Any impartial person would only come to the conclusion that North Central was ready, willing and able to proceed and that its case was active and pending. All the aforegoing were apparent on the face of the record to Lake Central and the Lake Central Employee Stockholders before it began its secret and clandestine discussions with the Board.

The Respondent attempts to distinguish several F.C.C. cases cited by North Central in its Petition which contain *ex parte* proceedings strikingly similar to those involved in the present case. Contrary to Respondent's con-

tentions, the discussions between the Lake Central Employee Stockholders and Board members did involve the merits of a pending case; the case was an active pending case as shown, *supra;* the *ex parte* conferences were secret and clandestine as no representative of Petitioner was present or even knew of the conferences. A secret and clandestine nature is the very essence of *ex parte* conferences. Subsequent publication of the conferences does not cure them of these grave defects. Petitioner is at a loss to understand the Department of Justice's position in this case relating to *ex parte* conferences when in other cases it has condemned them.[2] Its feeble attempt to distinguish this case from those previous F.C.C. cases is more invidious than real.

Petitioner agrees with the Solicitor General that the Court of Appeals is usually alert in dealing with questions of *ex parte* character and has on several occasions reversed and remanded. However, we believe that the Court has erred in this case in not recognizing the damage caused by these *ex parte* conferences to Petitioner. We believe the error of the Court of Appeals here is similar to the *WORZ, Inc.* v. *F.C.C. Case*, 79 S.Ct. 114 (1958), where the Supreme Court granted certiorari and remanded the case to the United States Court of Appeals for the District of Columbia Circuit on the basis of similar error involving *ex parte* conferences.

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[2] When *WKAT* v. *F.C.C.*, 258 F.2d 418 (U.S.App.D.C. 1958) was remanded to the F.C.C. for a determination as to the prejudicial effect which certain improper *ex parte* conferences had on the parties, the Justice Department filed a brief in *amicus curiae* under the F.C.C. Docket No. 9321 *et al.*, in which it took the position that such conferences in administrative adversary proceedings are improper.

V. THE U. S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IMPROPERLY SANCTIONED AN UNEXPLAINED DEPARTURE BY THE CIVIL AERONAUTICS BOARD FROM ITS PRIOR NORMS CONCERNING ACQUISITION AND MERGER CASES.

Both Lake Central and the Department of Justice apparently misunderstand North Central's contention with respect to the necessity that the Board explain its departure from its prior norms. In presenting this point, we do not challenge the Board's use of its administrative discretion. We merely say that an unexplained departure from prior norms makes the Board's findings insufficient to enable the Court to properly perform its task of judicial review. If the Board has departed from its prior norms without good reason, its decision is arbitrary. If it has good reason for its action, that reason should be set forth specifically. Otherwise the Court will not be able to determine whether the Board's decision is arbitrary.

VI. THE QUESTIONS ON WHICH THE COURT OF APPEALS REQUESTED SUPPLEMENTAL BRIEFS WERE PROPERLY BEFORE THE COURT.

Lake Central and the Lake Central Employee Stockholder Group base their Briefs primarily on the contention that this Court cannot review the issues posed by the United States Court of Appeals in its request for supplemental briefs because North Central did not raise these issues in the administrative proceeding below or in the Court of Appeals. Respondent obviously believes that these questions can be properly considered since it does not challenge their consideration.

During the various stages of the administrative proceeding, North Central objected to the subject matter

of each of the Court's questions[3] except with respect to the *ex parte* conferences. At the prehearing conference, North Central objected to the consolidation of the applications of other potential purchasers of the Lake Central stock (Orig. Tr. 230). North Central also requested at the prehearing conference that the issues in Docket No. 5770 be restricted to the consideration of its acquisition agreement. It formalized these objections in its answer to the motions of Ozark Airlines and Transport Air Group for consolidation of their applications for the Lake Central routes with North Central's acquisition proceeding (Orig. Tr. 259). The Board recognized and passed on these objections in its Order No. E-7543 (Orig. Tr. 301), when it denied these motions to consolidate but instituted an investigation ". . . to determine whether, and upon what terms, the acquisition of the majority stockholding interest in Lake Central by North Central, Ozark and/or Air Group and whether and upon what terms the acquisition of Lake Central's Route No. 88 in whole or in part by North Central, Ozark and/or Air Group is consistent with the public interest . . ." This investigation was consolidated in Docket No. 5770 and Ozark and Air Group were permitted to intervene.

North Central also objected to the amendment of the Weesner voting trust agreement so as to permit the Lake Central Employee Stockholders to acquire the Weesners' interest (Orig. Tr. 443, 453, 463) and the intervention of the Lake Central Employee Stockholders in Docket No. 5770 (Orig. Tr. 376). The Board overruled these objections in Orders No. E-8736, E-8931 and E-9404 (Orig. Tr. 430, 484).[4]

The requirements of Section 1006(e) of the Civil Aeronautics Act of 1938, as amended, were, therefore, ful-

[3] The questions certified by the Court of Appeals are set forth on Page 568 of the Record.

[4] Order No. E-8931 was issued in the *Reopened Indiana-Ohio Local Service Case*, Docket No. 4034 et al.

filled. The Civil Aeronautics Board had ample opportunity and did, in fact, consider these issues and decided them adversely to North Central.

The Intervenors contend that since these matters were not raised before the U. S. Court of Appeals for the District of Columbia Circuit in North Central's Petition for Judicial Review, the prehearing conference stipulation, Brief, or oral argument, Rule 38(k) of the Rules of that Court operates to place them beyond the scope of the Court's consideration. Such might have been the case if Petitioner itself had attempted to raise issues other than those stipulated. The additional issues were, however, certified by the Court under its Rule 17(i). The Court has the authority at its option to notice and pass upon plain error although it was neither pointed out nor relied upon by the parties. *WLOX Broadcasting Company* v. *F.C.C.*, 260 F.2d 712 (1958).

North Central admits that it did not raise the question of the impropriety of *ex parte* conferences before the Board, but we contend that the Court of Appeals had the authority under its Rule 17(i) to raise this question *sua sponte*. Section 1006(e) of the Civil Aeronautics Act of 1938 states:

> "No objection to an order of the Authority shall be considered by the Court unless such objection has been urged before the Authority *or, if it was not so urged, unless there were reasonable grounds for the failure to do so.*" (Emphasis supplied)

It would have been unwise and impractical for us to have alienated the Board by raising this question before them. To arouse the opposition of the Board or even a single member by raising such issues could destroy a local service carrier. Because of their immaturity and their dynamic development, local service carriers are continually before the Board. They are intensively regulated and highly subsidized. A disallowance of a cent a

mile in a local carrier's subsidy payment is well within the Board's discretion and such a disallowance could cause a local carrier to become insolvent. Obviously North Central suffered serious damage because of the *ex parte* conferences in this case, but because of the above considerations and because of the great number of route applications which it prosecutes each year, North Central could suffer even greater loss if it risked alienation of the Board by pursuing the *ex parte* conference question. This is a type of administrative duress.[5] Since the Court raised this question *sua sponte*, North Central was obliged to reply. We suggest that administrative duress presents "reasonable grounds" pursuant to Section 1006(e) of the Civil Aeronautics Act for the failure of North Central to raise the issue below. Therefore, it is properly before the Court.

In the case of *WORZ* v. *F.C.C.*, supra, the Supreme Court granted certiorari over the Solicitor General's contention that no objection had been presented to the Court of Appeals and remanded the case to the Court below. Two of the justices dissented on the ground that the question had not been raised below. Obviously the Court considered the issue and rejected the Solicitor General's contention, apparently finding that the nature of the issues presents reasonable grounds for the failure to raise them.

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[5] "Administrative duress" is analogous to "economic duress" which applies in contract cases. In contract law this "economic duress" constitutes grounds for recission. (See Williston on Contracts, Vol. 5, § 1618). For example: An unlawful refusal by a mortgagee to release a mortgage unless he is paid a bonus (*Reed* v. *Boagni*, 142 S. 171 (La. App.), or a demand of an excessive payment in order to prevent foreclosure (*Joannin* v. *Ogiltvie*, 49 Minn. 564, 52 N.W. 217) may amount to duress, which would allow one who promises to pay the bonus or excessive payment to rescind his contract. Similarly, parties to administrative proceedings who act or fail to act under administrative duress should not be forced to abide by their actions or inactions.

CONCLUSION

For the foregoing reasons and the reasons submitted in the original Petition for Certiorari, Petitioner renews its request that this Honorable Court grant its Petition for Certiorari and that the judgment of the Court of Appeals for the District of Columbia Circuit be vacated, reversed and set aside and that this case be remanded to said Court of Appeals with instructions to proceed further in accordance with the view of this Court.

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Dated: June 3, 1959

CERTIFICATE OF SERVICE

I, Asher L. Wheeler, counsel for the Petitioner North Central Airlines, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on June 3, 1959, I served the Reply Brief of North Central Airlines, Inc. on the parties to this cause by mailing a copy thereof to each of the persons listed below at the addresses shown, by first-class mail, postage prepaid:

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June 3, 1959